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Citation for published version:

Cairns, JW 2017, 'Spanish Law, the Teatro de la legislación universal de España e Indias, and the background to the drafting of the Digest of Orleans of 1808', *Tulane European and Civil Law Forum*, vol. 31-32, pp. 79-120. <<https://journals.tulane.edu/teclf/article/view/1578>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Tulane European and Civil Law Forum

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Spanish Law, the *Teatro de la legislación universal de España e Indias*, and
the Background to the Drafting of the Digest of Orleans of 1808

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I. INTRODUCTION

II. CODIFICATION AND CODIFIERS, 1806-1808

III. SOURCES OF LAW, 1804-1806

IV. LEGISLATURES AND CODES

V. THE VETOED ACT AND THE SPANISH LAW

VI. THE MANIFESTO AND THE CODE

VII. CONCLUSION

I. INTRODUCTION

It is tempting to see the work of redaction of the Digest of the Civil Laws Now in Force in the Territory of Orleans of 1808 as an event within the history of the Territory in the United States, and largely contingent on local and U.S. concerns. And, of course, so it was; but this was far from the entire story. Global politics in an era of warring empires had a major impact on the development of thinking about the law in the Territory and on the attitudes of all the inhabitants to the law. Three sets of interlocking events in particular had an understandable and significant impact on the development of the law.

First, the newly acquired U.S. Territory had boundaries, sometimes ill defined, with Spanish colonies. France had sold Louisiana to the United States of America; but for the

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Spanish the validity of the Louisiana Purchase was questionable. It is easy to understand why. Not only in negotiations to return Louisiana to France had France undertaken not to cede Louisiana to a third party, but the U.S. occupation of Louisiana also threatened the Spanish territories of East and West Florida—not long regained from the British—and its province of Texas. The U.S. Governor of the Territory of Orleans, William C. C. Claiborne, thus spent much of the territorial period understandably anxious about the intentions of Spain and frustrated and alarmed by the behavior of the local representatives of the Spanish crown, whose activities he saw as likely to encourage the creole population, whom he tended to distrust, in a belief that Spain might recover the Territory.¹ This led him to worry about Spanish troop movements.² And indeed his correspondence with the President, Thomas Jefferson, the Secretary of State, James Madison, and the Secretary of War, Henry Dearborn, is full of concerns about the military activities of Spain.³ Claiborne did not immediately feel secure in the newly acquired territory. The authority of the U.S. government may have seemed potentially fragile.

Secondly, the slave revolt on St. Domingue led by Toussaint L'Ouverture and Jean-Jacques Dessalines not only eventually encouraged Napoleon to sell Louisiana, but it

¹ J. C. A. STAGG, *BORDERLINES IN BORDERLANDS: JAMES MADISON AND THE SPANISH-AMERICAN FRONTIER, 1776-1821*, 54-56 (2009); Jared W. Bradley, *W. C. C. Claiborne and Spain: Foreign Affairs Under Jefferson and Madison, 1801-1811*, 12 *LA. HIST.* 297, 300-302 (1971).

² Bradley, *supra* note 1, at 312-14.

³ See, e.g., Letter from William C. C. Claiborne to James Madison (Feb. 26, 1804), in 1 WILLIAM C. C. CLAIBORNE, *OFFICIAL LETTER BOOKS OF W. C. C. CLAIBORNE, 1801-1816*, at 387-88 (Dunbar Rowland, ed., 1917) [hereinafter CLAIBORNE, LETTER BOOKS]; Letter from William C. C. Claiborne to Henry Dearborn (Apr. 20, 1804), in 2 CLAIBORNE, LETTER BOOKS, 108; William C. C. Claiborne to James Madison, Oct. 24, 1805, in 3 CLAIBORNE, LETTER BOOKS, at 211-13; Letter from William C. C. Claiborne to Henry Dearborn (Oct. 30, 1805), in 3 CLAIBORNE, LETTER BOOKS, at 216-17.

also had a direct impact on the development of the Territory.⁴ French colonists and free people of color fled St. Domingue; many of these came to the Territory of Orleans, sometimes with their slaves. This was another group distrusted by Claiborne; but it was one—large, powerful, and often well educated—that had a major impact on the culture of New Orleans and the Territory.⁵ The refugees from St. Domingue came to New Orleans in waves, first in 1803, and then 1803-1804 after they were expelled from Jamaica, and then in 1809 after they were expelled from Havana.⁶ This reflected developments in the war in Europe as well as events on the island. Again, the arrival of these groups worried Claiborne.⁷

Thirdly, as Eberhard Faber has convincingly argued, the brief French regime under Napoleon's *Prefet*, Pierre Clément de Laussat, had longer-term ramifications than has hitherto been thought, contributing to the initial instability of the American regime under Governor Claiborne. Laussat's activities solidified a certain type of francophone nationalism among the creoles that gave them a means of resistance to Jeffersonian republican assimilation, while also presenting images of a possible French future that never was to be, but which would have an impact on the creoles' attitudes to their new government.⁸

⁴ See Laurent Dubois, *The Haitian Revolution and the Sale of Louisiana; or, Thomas Jefferson's (Unpaid) Debt to Jean-Jacques Dessalines*, in *EMPIRES OF THE IMAGINATION: TRANSATLANTIC HISTORIES OF THE LOUISIANA PURCHASE*, 93 (Peter J. Kastor and François Weil eds., 2009).

⁵ NATHALIE DESSENS, *FROM SAINT-DOMINGUE TO NEW ORLEANS: MIGRATION AND INFLUENCES*, 24-28 (2007) provides the vital demographic study.

⁶ Nathalie Dessens, *The Saint-Domingue Refugees and the Preservation of Gallic Culture In Early American New Orleans*, 8 *FRENCH COLONIAL HISTORY*, 53, 56 (2007); Paul F. Lachance, *The 1809 Immigration of Saint-Domingue Refugees to New Orleans: Reception, Integration and Impact*, 29 *LA. HIST.* 109 (1988).

⁷ Letters from W. C. C. Claiborne to James Madison (Feb. 6 & Feb. 26, 1804), in 1 *CLAIBORNE, LETTER BOOKS*, *supra* note 3, at 363-65, 387-88; Letters from W. C. C. Claiborne to James Madison (Apr. 9, 1804 & May 8, 1804), in 2 *CLAIBORNE, LETTER BOOKS*, *supra* note 3, at 88-89, 134; Letter from W. C. C. Claiborne to Robert Smith (Nov. 12, 1809), in 5 *CLAIBORNE, LETTER BOOKS*, *supra* note 3, at 1-3.

⁸ Eberhard L. Faber, *The Passion of the Prefect: Pierre Clément de Laussat, 1803 New Orleans, and the Bonapartist Louisiana that Never Was*, 54 *LA. HIST.* 261 (2013) [hereinafter Faber, *Passion of the Prefect*];

These tensions and conflicts played a significant part in the production of the Digest of 1808. The debate initiated by professors Pascal and Batiza over the sources used in compiling the Digest of the Civil Laws Now in Force in the Territory of Orleans of 1808 lacked a significant depth of richness through not paying sufficient attention to them. This debate has probably now run its course.⁹ But it is important to say a little about it so that what follows can be grounded in the existing literature. The ingenious idea that the Digest was French in language but Spanish in essence will probably linger on for a while, as it is now woven into some of the more general discussions of the legal history of Louisiana. It has no doubt joined those other disproven and untenable views that continue to exercise influence—if decreasing—from their graves. But the accumulated weight of evidence is, however, firmly against it.¹⁰ That the Digest is not Spanish law in French dress does not mean, however, that it is entirely French. The issue is much more complicated. The Digest is a unique and fascinating civil code.

All debates are creative in the long run; they stimulate and inspire others to carry out work to prove or disprove differing points of view. But they can sometimes suppress endeavor and new research; and, indeed, the debate over the sources of the Digest was

EBERHARD L. FABER, *BUILDING THE LAND OF DREAMS: NEW ORLEANS AND THE TRANSFORMATION OF EARLY AMERICA*, 83-117 (2016); [hereinafter FABER, *LAND OF DREAMS*].

⁹ Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971) [hereinafter Batiza, *Actual Sources 1808*]; Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); Joseph Modeste Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972). For an overview of the debate, see John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 35-38 (2009) [hereinafter Cairns, *de la Vergne Volume*]; JOHN W. CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY: LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866)*, 433-40 (2015) [hereinafter CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY*]; Asya Ostroukh, *Reception of the French Civil Code in Quebec, Louisiana and Francophone Switzerland: A Socio-Legal Study*, 13-23 (unpublished Ph.D. thesis, University of Edinburgh, 2016).

¹⁰ Olivier Moréteau, Book Review, 4 COMP. LEG. HIST. 94, 97-98 (2016) (reviewing CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY*, *supra*, note 9); Olivier Moréteau, *The Louisiana Civil Code in French: Translation and Re-Translation*, 9 J. CIV. L. STUD. 223, 229-31 (2016).

one that has in many ways served to obscure or to distract from interesting questions. For example, some important issues—such as the creativity of the codifiers, James Brown and Louis Moreau Lislet, and the manner in which they collaborated—have become obscured in the heated discussions of whether the code they produced was “French” or “Spanish.”

It is tempting to write that the Digest is a code in the tradition of the French *Code civil*; this is correct only in so far as in 1808 it was helping constitute such a tradition, and both it and in particular its successor Civil Code of the State of Louisiana of 1825 were to exercise significant influence within that tradition.¹¹ But that civil codes may constitute a tradition does not mean that they are identical. Though very strongly influenced by the *Code civil*, the Digest is also unique and different in all kinds of ways. For example, while the first book of the French code has a significant focus on the idea of citizenship, that of the Digest is organized around the more traditional civilian category of “persons,” probably as conceptually better for the inclusion of slavery.¹²

One of the important issues not as thoroughly explored as it might have been is the use of Spanish sources in the early Territorial period, with their impact on the eventual drafting of the Digest. It has long been recognized that contemporaries considered there to have been a problem of access to relevant legal materials in the immediate aftermath

¹¹ See, e.g., Rolf Knütel, *Influences of the Louisiana Civil Code in Latin America*, 70 TUL. L. REV. 1445 (1996); Jean-Louis Halpérin, *Le code civil*, 135-36 (2nd ed. 2003); Agustín Parise, *The Place of the Louisiana Civil Code in the Hispanic Civil Law Codifications: Inclusion in the Comments to the Spanish Civil Code Project of 1851*, 68 LA. L. REV. 823 (2008); Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103 (2009); AGUSTÍN PARISE, OWNERSHIP PARADIGMS IN AMERICAN CIVIL LAW JURISDICTIONS: MANIFESTATIONS OF THE SHIFTS IN THE LEGISLATION OF LOUISIANA, CHILE, AND ARGENTINA (16TH-20TH CENTURIES), 139-43 (2016).

¹² John W. Cairns, *Blackstone in the Bayous: Inscribing Slavery in the Louisiana Digest of 1808*, in RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS, 73, 88-90, 93-94 (W. Prest ed., 2014).

of the Louisiana Purchase. This article will assess afresh much of the primary evidence of this, often in greater detail than has been done before, to present a new argument about the sources used and the actual work of the codifiers, with a concern for some of the language used.

Here we will first examine the redactors and their work, reflecting on the evidence we have of the task before them and how they carried it out. We will then explore the problem of the sources of the law in the early territorial period, before moving to a consideration of the changing nature of government in the Territory and the impact this had on the issue of codification and sources of law, leading to an act, vetoed by the governor, that set out the sources of law for the Territory. We will next reflect on the vetoed act and the Spanish law, followed by an assessment of the reaction to the veto and a call for codification. The conclusion will explain why the redactors acted as they did.

II. CODIFICATION AND CODIFIERS, 1806-1808

In 1806, the Legislative Council and House of Representatives of the Territory of Orleans issued Resolutions appointing “James Brown and Moreau Lislet ... to compile and prepare, jointly, a Civil Code for the use of this territory;” it also instructed them to “make the civil law by which this territory is now governed, the ground work of said code.” Brown and Moreau Lislet were to work in consultation with a committee of both houses of the legislature, four from the House of Representatives and two from the Legislative Council, which would monitor their work.¹³ The code finally enacted and

¹³ Resolutions of June 7, 1806, in *ACTS PASSED AT THE FIRST SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS* 214-19 (New Orleans, Bradford and Anderson, 1807) [hereinafter *Resolutions of June 7, 1806*].

promulgated in 1808 was entitled A Digest of the Civil Laws Now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to its Present Form of Government.¹⁴

Both James Brown (1766-1835) and Louis Moreau Lislet (1766?-1832) were recent incomers: Brown from the U.S.A. and Moreau Lislet from St. Domingue. Brown was one of the many individuals who came to Louisiana from anglophone North America immediately after the Purchase. Moreau Lislet's situation was more complicated. He came at the time of the first great influx into Louisiana of refugees from St. Domingue.¹⁵ A sense of the lives of these two men is important in explaining their work on the Digest.

The Virginian-born Brown had studied at Liberty Hall (later Washington and Lee University) and the College of William and Mary before training as a lawyer in Kentucky, where his elder brother (who had trained as a lawyer with Thomas Jefferson) was U.S. Senator after having pursued a public career in Virginia. Through his wife Anna or "Nancy" Hart James Brown was the brother-in-law of Henry Clay. Brown had served as Secretary of State in Kentucky. He was one of the many Americans who came to New Orleans after the Louisiana Purchase in search of lucrative government office to be secured through patronage (which his networks would aid him in acquiring) and opportunities to acquire land and make money. In all of these Brown succeeded, acquiring a substantial plantation on the German Coast upriver from New Orleans, becoming Secretary to the Territory (1804-5), then District Attorney for Orleans (1805),

¹⁴ Act Providing for the Promulgation of the Digest of the Civil Laws Now in Force in the Territory of Orleans, 1808, ch. 29, in ACTS PASSED AT THE FIRST SESSION OF THE SECOND LEGISLATURE OF THE TERRITORY OF ORLEANS 120-29 (New-Orleans, Bradford & Anderson Printers, 1808) [hereinafter ACTS FIRST SESSION OF SECOND LEGISLATURE].

¹⁵ DESSENS, *supra* note 5, at 24-28.

and U.S. Agent to investigate land claims in the eastern district of the Territory (1805). He held these offices during the work on preparation of the Digest, as well as becoming a lieutenant of the militia (1805) and a Justice of the Peace (1806). He later served twice as U.S. Senator for Louisiana after statehood in 1812, before becoming U.S. minister to France in the 1820s.¹⁶ Brown knew both French and Spanish.¹⁷

Moreau Lislet was born in St. Domingue, the son of Jacob Vincent Moreau and Elizabeth Torel, part of the island's white, French elite.¹⁸ He was evidently marked by his origins in the Caribbean island, as when one critic, Jeremiah Brown, attacked his work on the Digest, he described him as the "St. Domingo Lycurgus."¹⁹ Brown, however, attacked the lawyers from St. Domingue more generally.²⁰ Moreau Lislet studied law in Paris in the 1780s, and was admitted as an *avocat au Parlement*.²¹ There he married Anne Elisabeth Philippine de Peters (his brother-in-law Augustin was also a law student and a future *avocat*). Moreau Lislet's father-in-law Johann Anton (Jean Antoine) was the official painter of the King of Denmark.²² It is worth noting that Moreau Lislet's sister married another lawyer from St Domingue.²³ Moreau Lislet's guardian in his marriage contract was his distinguished fellow lawyer from St. Domingue and *Conseiller du Roy* in the Council of St. Domingue, Médéric Louis Moreau de St Méry, at the same time both

¹⁶ Jared William Bradley, *James Brown*, in INTERIM APPOINTMENT: W. C. C. CLAIBORNE LETTER BOOK, 1804-1805, WITH BIOGRAPHICAL SKETCHES 258 (J. W. Bradley ed., 2002).

¹⁷ See Letter from James Brown to the President [Thomas Jefferson], Jan. 8, 1805, in TERRITORIAL PAPERS OF THE UNITED STATES. VOLUME IX. THE TERRITORY OF ORLEANS 1803-1812, at 365-66 (Clarence Edwin Carter ed., 1940) [hereinafter ORLEANS TERRITORIAL PAPERS]. Bradley, *supra* note 16, at 261 points to problems in the translations of the Digest and suggests they indicate that Brown may not have been so skilled in languages as usually suggested. Bradley, however, is unaware of the role of the translators.

¹⁸ ALAIN LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808, 71-78 (rev. ed., 2008) [hereinafter LEVASSEUR, MOREAU LISLET].

¹⁹ JEREMIAH BROWN, A SHORT LETTER TO A MEMBER OF CONGRESS CONCERNING THE TERRITORY OF ORLEANS, 21 (Washington City, n. p., 1806) [hereinafter BROWN, SHORT LETTER].

²⁰ *Id.* at 8-10, 20-22. On the lawyers from St. Domingue, see DESSENS, *supra* note 5, at 71.

²¹ LEVASSEUR, MOREAU LISLET, *supra* note 18, at 95.

²² *Id.* at 76-77, 95-97.

²³ *Id.* at 77-78.

philosophe and defender of colonial slavery.²⁴ Moreau Lislet was clearly well connected in the legal profession and in the society of St Domingue. He returned to the island with his wife to hold the office of *Premier substitut du procureur général au Conseil supérieur de Saint Domingue*, based at Cap Français. Apart from a brief spell in Philadelphia during the height of the revolt, Moreau Lislet spent the troubled years of the 1790s in St. Domingue once Toussaint Louverture and Jean-Jacques Dessalines, as the leaders of the revolt, had accepted the validity of French authority in the colony consequent on the French abolition of slavery. Moreau Lislet held various government and legal offices and acted as an attorney for emigrés trying to protect their property, while also trying to keep secure that of his own family. In August 1803, according to a colonial document, Moreau Lislet was sailing from Port Républicain (Port-au-Prince) to Cap Français on government business, when, to avoid enemy ships (there was a British blockade), the vessel he was on took refuge in Santiago in Cuba. The British Blockade prevented his return to St. Domingue should he have wished it; but there was already bitter warfare in St. Domingue as the Napoleonic regime tried but failed to establish control over the colony. Moreau Lislet seems to have stayed in Cuba for about a year, before making his way to New Orleans.²⁵

Moreau Lislet held a number of patronage posts in the city. For some years he was an official translator. He practiced law, served as judge of the City and Parish of New Orleans (this office allowed him still to practice law, and included significant administrative responsibilities), and was appointed to the post of judge of the Superior Court of the Territory (an office in the gift of the President that he declined), as well as

²⁴ *Id.* at 96; Joseph G. Rosengarten, *Moreau de Saint Mery and His French Friends in the American Philosophical Society*, 50 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, 168 (1911).

²⁵ LEVASSEUR, *supra* note 18, at 95-113.

being involved in a variety of civic projects. He also served as attorney for the city of New Orleans. After the Territory of Orleans had become the State of Louisiana, he was briefly a State Senator, then Attorney General of the State, while also continuing in private practice and as attorney for the city. He became a member of the Louisiana House of Representatives for a number of years, before being appointed to the Commission to draft the Civil Code. He was now elected a State Senator, and participated in a variety of other activities, including practice as an attorney. Despite all these activities, he died a poor man.²⁶

Thus, in 1806 to 1808 both men, in vigorous middle age, were making their way as highly educated and engaged members of the rising white elite of New Orleans, an elite of merchants, planters, and professionals that transcended the real divisions of language and origins.²⁷ Both had extensive legal and administrative experience. Brown had better links with the networks of power around Jefferson and the Federal Government; but Moreau Lislet was also forging connections more locally. We know that Brown had earlier been in favor of a code to sort out difficulties with the law in the territory, and that he had drafted legislation relating to the administration of justice for the Legislative Council “to assimilate it to the American Jurisprudence.”²⁸ Moreau Lislet’s work as a translator of the legislation of the Legislative Council under the first government, and then as translator of the legislation passed by the First Legislature of

²⁶ *Id.*, at 114-66.

²⁷ FABER, *LAND OF DREAMS*, *supra* note 8, at 215-45. The significance of this elite is a strong theme in this important work, which stresses class over ethnic tensions, while not denying the latter.

²⁸ Letters from James Brown to John Breckinridge (Jan. 22 & Sept. 17 1805), in *ORLEANS TERRITORIAL PAPERS*, *supra* note 17, at 378-80, 506-513 (at 507); James Workman, *A Letter to the Respectable Citizens, Inhabitants of the County of Orleans, Together With Several Letters to Governor Claiborne, and other Documents Relative to the Extraordinary Measures Lately Pursued in This Territory*, in JAMES WORKMAN, *ESSAYS AND LETTERS ON VARIOUS POLITICAL SUBJECTS*, [107], 113-115 (2nd ed., New York, I. Riley, 1809). This might include the Act Regulating Practice of the Superior Court in Civil Causes, 1805, ch. 26, in *ACTS PASSED AT THE FIRST SESSION OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF ORLEANS*, 210 (New-Orleans, James M. Bradford, 1805) [hereinafter *ACTS PASSED AT THE FIRST SESSION OF THE LEGISLATIVE COUNCIL*].

the Territory under the new constitution, gave him both familiarity with legislative practice and access to the influential men of the Territory, such as Brown. Indeed, Moreau Lislet had translated Livingston's important Act organizing the procedure of the Superior Court, and Richard Kilbourne has persuasively argued that Brown may have co-authored this.²⁹

Brown and Moreau Lislet must have been picked, not only because of their legal knowledge, but also because of their knowledge of the French, Spanish, and English languages. Moreau Lislet's year in Cuba will have allowed him to learn Spanish, if he did not know it before, while, virtually from his arrival in New Orleans, he was working in English and French. Jefferson had appointed Brown Secretary of State of the Territory because of "his possession of the languages," and later appointed him to the Superior Court because of his knowledge of French.³⁰ Brown later told the President that his "knowledge of the French and Spanish languages and ... reputation ... as a Lawyer ... insured [him] success."³¹

The work on codifying the law that resulted in promulgation of the Digest has generated no surviving records or other archival material. The Resolutions of June 7, 1806 stated that the committee of four members of the House of Representatives and two members of the Legislative Council was to meet "whenever requested to do so by the jurisconsults, in order to examine and to discuss such parts of the new code as may be

²⁹ LEVASSEUR, *supra* note 18, at 115-16. See Act Regulating Practice of the Superior Court in Civil Causes. 1805, *supra* note 28, at 261; RICHARD HOLCOLME KILBOURNE, JR, A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839, 25-26 n.75 (1987).

³⁰ See Letter from the President [Thomas Jefferson] to Governor [William C. C.] Claiborne (Aug. 30, 1804), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 281-84; Letter from the President [Thomas Jefferson] to Secretary [James] Brown (Dec. 1, 1804), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 341-42.

³¹ Letter from James Brown to the President [Thomas Jefferson] (Jan. 8, 1805), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 365-66.

completed.” The committee was to fix the place of meeting and then intimate it to the “jurisconsults,” who had to be present at the meeting and were to “have the right to debate.” Further, the Resolutions stated that “whenever the opinion of the committee, after the discussion of any article of the new code shall be in opposition with the opinion of the two jurisconsults, this opinion of the committee shall be put down in writing and submitted to the legislature, when the legislature shall take up the discussion of the said code.”³² This committee was known as “the committee for the revision of the civil code,” and it had a president.³³ Unfortunately, we do not know who served in this office, nor, indeed, the names of any members of the committee. Thus, Moreau Lislet and Brown drafted and the committee revised. There is no evidence as to how this worked, nor of how Brown and Moreau Lislet worked together, nor of how they cooperated with the committee nor with the translators and other individuals involved in the project, such as clerks.³⁴

There is some slight and unclear evidence on the relationship between James Brown and Moreau Lislet. Jeremiah Brown, who opposed the preservation of the Civil Law in Louisiana, stated in November 1806 that, as a common lawyer, James Brown’s role was “to serve as a mask” for the designs of those who wished to preserve the Civil Law, as James Brown could “know but little of the civil law and still less of the Bonapartian code.”³⁵ He referred to the fact that the drafting of the code, and hence the choice of the law, was “now left to the two *jurisconsults*,” one of whom was “a native frenchman” from

³² Resolutions of June 7, 1806, *supra* note 13, at 214-17.

³³ An Act Providing for the Payment of Sundry Expences Incurred in Revising and Copying the Civil Code, 1808, ch. 23, in ACTS FIRST SESSION OF SECOND LEGISLATURE, *supra* note 14, 92-93.

³⁴ *Id.* (citing the names of the men paid); *see also* Vernon Valentine Palmer, The Secret Translators of the Louisiana Civil Codes, Unpublished Paper, Delivered to the World Society of Mixed Jurisdiction Jurists, Montréal (June 24, 2015).

³⁵ BROWN, SHORT LETTER, *supra* note 19, at 36 n.*. The SHORT LETTER is dated November 1, 1806: *id.* at [3].

St. Domingue. He had already fulminated against what he saw as the malign influence of lawyers from St. Domingue as likely to inhibit the reception of the common law in Louisiana. He now commented of Moreau Lislet that “our St. Domingo Lycurgus is avowedly copying his new code from that of Bonaparte, to the infinite delight of the whole party by whom he is employed.”³⁶ This suggests that Moreau Lislet was dominant in drafting the proposed code. It should be remembered, however, that Jeremiah Brown’s aim was to attack the code through its association with the lawyers from St. Domingue;³⁷ this meant that he necessarily downplayed the role of James Brown. That Jeremiah Brown was so *parti pris* suggests we should take *cum grano salis* his claims that the energetic and well-educated James Brown knew nothing about the French *Code civil* and the civil law generally, and that he was willing to act—or unable to realize he was acting—as some kind of cover for Moreau Lislet’s malevolent Gallic scheming. It is difficult to think of Brown as anyone’s dupe.

Rodolfo Batiza and Thomas Tucker have suggested that James Brown took no part in the drafting of the Digest.³⁸ They founded this claim on a statement in the Preliminary Report published in 1823 by the Committee Appointed in 1822 for the Revision of the Civil Code.³⁹ After an account of proposals to perfect the proposed new Code, and reflections on the respective roles of the judiciary and the legislature in doing so, the Committee made an interesting set of remarks on the Digest. It is necessary to quote them at length so the context can be understood:

³⁶ *Id.* at 8-11, 21-22.

³⁷ *Id.* at 8-11.

³⁸ Batiza, *Actual Sources*, *supra* note 9, at 28 n.164; Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L. F., 57, 131-32 n.211 (2004); *see also* VERNON VALENTINE PALMER, THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION, 21 n. 3 (2005) [hereinafter PALMER, LOUISIANA CIVILIAN EXPERIENCE]. Palmer cautiously describes Moreau Lislet as the “mastermind.”

³⁹ Tucker also alludes to a tradition that Brown left the Territory: Tucker, *supra* note 23, at 131-32 n.211. This is inaccurate.

Its rules being concise, and in general easily understood, have been read by the people and have enabled them to avoid disputes, on the subjects embraced by its provisions, that without them, would have led to endless litigation; and if some parts have given rise to questions of construction, they have arisen chiefly either from a faulty translation, or from errors inevitably attending a work so hastily compiled. Sufficient time was not given for an accurate examination of the existing Law in its various sources. No decisions had then been reported to throw light on their operation, and the unaided exertions of one person were not sufficient for the completion of the task.⁴⁰

This quotation has a variety of interesting implications. First, it suggests that the Digest had largely been a success in resolving the immediate legal problems faced in the Territory. Secondly, it emphasizes the speed of compilation of the Digest as a factor in any defects that it might have. Thirdly, it states that because of the lack of time devoted to preparing the Digest, the “existing Law” had not been thoroughly examined “in its various sources.” Moreover, there were as yet no “decisions ... reported” to throw light on “their operation.” Grammar would suggest that this refers to the “sources”; but this must mean something like operation of the “existing Law.” The following comment is the crucial one for Batiza’s and Tucker’s claims: “and the unaided exertions of one person were not sufficient for the completion of the task.” They took this as meaning that Moreau Lislet *alone* compiled the Digest; but this is not in fact what the passage states. The “task” referred to must be the collecting of the decisions or, most likely, the investigation of the existing law, not the drafting of the Digest, which was, after all, a task that was completed. The previous two paragraphs in the Preliminary Report had

⁴⁰ Edward Livingston, Louis Moreau Lislet & Pierre Derbigny, Preliminary Report of the Code Commissioners (February 13, 1823), in LOUISIANA LEGAL ARCHIVES. VOLUME 1. A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, LXXXV, XCIII (1937) [hereinafter Livingston, Moreau Lislet & Derbigny, Preliminary Report].

been devoted to the relationship between the Code enacted by the legislature and the role of the judges in interpretation. Thus, this provides no real or, at best, very ambiguous evidence that Moreau Lislet was the sole author of the Digest.

There are two further, more reliable, pieces of evidence. The first is the address Governor Claiborne made to the Legislature in 1808, in which he stated that the work of compiling the Digest “principally devolved” on one Gentleman, who “evidenced a great share of zeal.”⁴¹ If this is a reference to Moreau Lislet, as surely it must be, then it does not mean he drew it up on his own, but only that he took on the greater proportion of the work, a conclusion in line with Jeremiah Brown’s critical remarks. The second piece of evidence comes from legislation. By January 1807, work on the Digest was proceeding apace.⁴² On April 14, 1807, Governor Claiborne signed an Act of the Territorial Legislature providing for the payment to Brown and Moreau Lislet of \$2,000 each, three-fifths to be paid immediately, with the remainder to be paid on completion of the Digest. Brown may have been well connected in Washington; but, if he had made no contribution or very little contribution, such a payment would seem unlikely and would surely have caused comment, if not scandal, in the febrile political atmosphere of 1807.⁴³ Underscoring this is the fact that, by now, the governor considered Brown to be a political enemy, largely because of his association with Edward Livingston.⁴⁴

⁴¹ Letter from Governor Claiborne to the Legislature (Mar. 31, 1808), in *ORLEANS TERRITORIAL PAPERS*, *supra* note 17, at 780.

⁴² The Code was “far advanced” according to Julien Poydras President of the Council, in Reply to Governor W. C. C. Claiborne’s Address to the Legislature (Jan. 22, 1807), in 4 *CLAIBORNE, LETTER BOOKS*, *supra* note 3, at 110-12, at 111.

⁴³ An Act to Fix the Compensation to be Allowed to the Two Jurisconsults, Appointed to Prepare a Civil Code for the Use of the Territory of Orleans, by the Resolution of Both Branches of the Legislature of This Territory, Under the Date of June the 7th, 1806, and to the Translators of the Said Code, 1807, ch. 31, in *ACTS PASSED AT THE SECOND SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS, 190-93* (New-Orleans, Bradford & Anderson, 1807); *see also* CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY*, *supra* note 9, at 77-78.

⁴⁴ Bradley, *supra* note 16, at 262-63.

Thus, we can see Moreau Lislet as leading the project under the direction of the Legislature's committee, working with Brown, the two translators, and other assistants.⁴⁵ It was the committee that had the authority to appropriate funds for the expenses of copying, translating, and the like.⁴⁶ Governor Claiborne stated that the Digest was drafted in French and translated into English. He also stated that the English translation was very poor indeed.⁴⁷ Moreau Lislet made a similar remark in court in 1822.⁴⁸ As Batiza has pointed out, the matter is obviously rather more complicated than that, since there are a number of articles drawn from the text of Blackstone's *Commentaries on the Laws of England* in which the language of drafting was presumably English, with the text translated into French.⁴⁹ Indeed, Guzmán has recently shown that the redactors also drew on Edward Christian's notes to Blackstone;⁵⁰ again, these articles must have been drafted in English with a subsequent translation into French.

It is easy to imagine Moreau Lislet and Brown working together, dividing tasks, drawing up an outline of the Digest, filling it in with articles, moving between French and English, working with the translators and others associated with the work (seven men

⁴⁵ In 1807, the Legislature awarded each of the two translators \$750, with three-fifths to be paid immediately and the remainder on completion: Act to Fix the Compensation to be Allowed, *supra* note 43, at 192-93.

⁴⁶ Resolutions of June 7, 1806, *supra* note 13, at 218-19.

⁴⁷ Letter from Governor [W. C. C.] Claiborne to the Legislature, (March 31, 1808), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 780; Letter from Governor [W. C. C.] Claiborne to the Secretary of State [James Madison] (Oct. 7, 1808), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 802-3.

⁴⁸ "We have nothing to do with the imperfections of the translation of the *Code*—the French text in which it is known that work was drawn up, leaves no doubt." Dufour v. Camfranc, 11 Mart. (O.S.) 675, 701 (La. 1822), quoted in John H. Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 285 (1932).

⁴⁹ Batiza, *Actual Sources 1808*, *supra* note 9, at 13-14, 25-28; see also Cairns, *Blackstone in the Bayous*, *supra* note 12, at 81-84.

⁵⁰ Alejandro Guzmán Brito, *Las fuentes de las normas sobre interpretación de las leyes del "Digest des lois civiles" ("code civil") de la Luisiana (1808/1825)*, 31 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS, 171, 185 (2009).

in total),⁵¹ and reporting to the Legislature's Committee for the Revision of the Civil Code, with Moreau Lislet taking the lead and perhaps undertaking the bulk of the work.

III. SOURCES OF LAW, 1804-1806

The precise original intention (supposing there was one) lying behind the drafting of the legislative phrase “the civil law by which this territory is now governed” (“les lois civiles qui régissent actuellement ce Territoire”) as forming “the ground work” (“base”) of the Code can only be the subject of speculation.⁵² It was later to be loosely echoed in the extended title given to the Digest in 1808.⁵³ This issue will be returned to below.

From a modern perspective it is obvious that the law theoretically in force at the time of the Purchase was Spanish colonial law—the Laws of the Indies—which provided, in default of provision in the colonial laws, for Castilian law to be applied.⁵⁴ During the brief French period in 1803, Napoleon's *Préfet*, Pierre Clément de Laussat, had made significant structural reforms, notably replacing the Spanish Cabildo with a Municipal Council;⁵⁵ but he had not changed the substantive law in force, except as regards slavery, though this reform does not seem to have had any significant impact on practice.⁵⁶ Indeed the Act for the Punishment of Crimes and Misdemeanors of 1805 specifically stated it was not to apply to any slave and that “every slave accused of any

⁵¹ Act Providing for the Payment of Sundry Expences, *supra* note 33, at 92-93.

⁵² Resolutions of June 7, 1806, *supra* note 13, at 214-15.

⁵³ See the important discussion in Asya Ostroukh, *The Mystery of the Mixité around the Title of the Louisiana Digest of Civil Laws of 1808*, 62 LOY. L. REV. 725 (2017).

⁵⁴ CAIRNS, CODIFICATION, TRANSPLANTS, AND HISTORY, *supra* note 9, at 44-48, 53-54.

⁵⁵ See, e.g., Faber, *Passion of the Prefect*, *supra* note 8; Julien Vernet, *More than Symbolic: Pierre Clément de Laussat's Municipal Council and French Louisianan Protest against American Territorial Government*, 4 FRENCH COLONIAL HISTORY, 133 (2003); André Lafargue, *Pierre Clement de Laussat, Colonial Prefect and High Commissioner of France in Louisiana: His Memoirs, Proclamations and Orders*, 20 LA. HIST. Q. 159 (1937).

⁵⁶ PIERRE CLÉMENT DE LAUSSAT, MEMOIRS OF MY LIFE 87 (Agnes-Josephine Pastwa trans., 1978); Hans W. Baade, *The Law of Slavery in Spanish Luisiana, 1769-1803*, in LOUISIANA'S LEGAL HERITAGE, 43, 70-74 (Edward F. Haas ed., 1983).

crime shall be punished according to the laws of Spain for regulating her colonies.”⁵⁷ In the Territorial period to 1808, a common-law-style court system was introduced, as well as English-style criminal law, while there had been major reform of the law on slavery in 1806 and of that on marriage in 1807.⁵⁸ Study of surviving records shows this legal regime in practice.⁵⁹

But it is wrong to assume that the redactors would necessarily have based their new code on Castilian law, understanding it as the “civil law by which this territory is now governed.”⁶⁰ They neither had the clarity of hindsight nor—one suspects—a strict and narrow sense of legislative positivism. All that one can know for certain is what the redactors in fact did; study of the provisions of the Digest can reveal with some degree of certainty what they considered, rejected, and adapted to create the new code. Much, of course, was taken from the *Code civil des Français* of 1804, its *projet* of 1800, and territorial legislation; but the redactors also drew on provisions and texts of Castilian law, Roman law, Blackstone’s *Commentaries*, Christian’s notes to Blackstone, and even the translation of Blackstone into French.⁶¹ They may even have drawn on other sources as yet unrecognized. In fact, the men who compiled the Digest of the Civil Laws were creative and eclectic in the choices they made in drafting their code, even if they relied

⁵⁷ An Act for the Punishment of Crimes and Misdemeanors, 1805, c. 50, s. 47, in ACTS PASSED AT THE FIRST SESSION OF THE LEGISLATIVE COUNCIL, *supra* note 28, at 416, 450.

⁵⁸ MARK F. FERNANDEZ, FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA’S JUDICIAL SYSTEM, 1712-1862, 16-39 (2001); Warren M. Billings, *A Neglected Treatise: Lewis Kerr’s Exposition and the Making of Criminal Law in Louisiana*, 36 LA. HIST. 261 (1997) [hereinafter Billings, *Neglected Treatise*]; Warren M. Billings, *Origins of Criminal Law in Louisiana*, 31 LA. HIST. 63 (1991); KILBOURNE, *supra* note 29, at 17-30; Vernon Valentine Palmer, *The Strange Science of Codifying Slavery*, 24 TUL. EUR. & CIV. L.F., 83, 94-101 (2009); An Act Concerning the Celebration of Marriages, 1807, ch. 17, in ACTS PASSED AT THE SECOND SESSION OF THE FIRST LEGISLATURE, *supra* note 43, at 102-31.

⁵⁹ KILBOURNE, *supra* note 29, at 44-60.

⁶⁰ Such a false assumption in part underlies the views of Robert Pascal in the Pascal-Batiza debate: see Pascal, *supra* note 9 (responding to Batiza, *Actual Sources 1808*, *supra* note 9).

⁶¹ Batiza, *Actual Sources 1808*, *supra* note 9, at 36-44; PALMER, LOUISIANA CIVILIAN EXPERIENCE, *supra* note 38, at 19-49; Guzmán Brito, *supra* note 50, at 185; Cairns, *Blackstone in the Bayous*, *supra* note 12, at 81-84.

most on that of France and its *projet*. A hundred years later, F. P. Walton was jocularly to remark that “[c]odifiers are arrant thieves;”⁶² this comment was already applicable to Moreau Lislet and Brown.

Moreover, for a period around the U.S. takeover of the colony, there had been considerable uncertainty over knowledge of the laws in force and problems with their accessibility. This created a potential for confusion. Thomas Jefferson had sought information about the province, including its laws, from a number of interlocutors.⁶³ One of them, possibly William Dunbar, told him, perfectly correctly, that “the province is governed entirely by the laws of Spain, and ordinances formed expressly for the colony.”⁶⁴ But there was an initial measure of confusion, perhaps arising from the perception of the colony as “French.” Thus, in August 1803, Governor Claiborne wrote to President Jefferson:

Louisiana, like most other Countries which have undergone a change of Masters, derives many of its Municipal Customs & regulations from different sources; By what kind of Laws, the French formerly governed the Province is unknown to me.—After its session by them to Spain, General O’Reily [*sic*] the Governor of the Province, published a Collection of Laws (as I am informed) of a general nature, but few in number. But whether that small code was a selection from the previous Laws of the Country, to which he intended to give new force, or were

⁶² F. P. Walton, *Civil Codes and their Revision: Some Suggestions for the Revision of the Title “Of Ownership,”* 1 S.L.Q., 95, 116 (1916).

⁶³ GEORGE DARGO, *JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS*, 190-93 (rev. ed., 2009) [hereinafter DARGO, *JEFFERSON’S LOUISIANA*].

⁶⁴ *Condition of Louisiana in 1803, When the American Government took Possession*, in 2 JOSEPH M. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES; TOGETHER WITH THE LAWS OF MEXICO AND TEXAS ON THE SAME SUBJECT, 690-698 at 692-693 (Philadelphia, T. & J. W. Johnson, 1839). The late Professor J. W. McKnight brought this to my attention. He speculated that these may be the lost answers of William Dunbar of Natchez, especially since some of the answers suggest the author was not in New Orleans.

certain Ordinances, then for the first time promulgated by authority of the new Government, I have not ascertained. O'Reily's Code is said still to be in print, but I have not been enabled to procure a Copy. Under the Spanish government at present, the Laws are enacted in the Council of State by order of the King. But in cases of small local Concern; I understand that the Governor General, with the advice of certain other officers of State at New-Orleans, has occasionally published some Regulations providing for the redress of Grievances in a summary way.⁶⁵

Daniel Clark had less excuse for uncertainty, having lived in New Orleans since the 1780s;⁶⁶ but he nonetheless informed Jefferson: "The Code of Laws is derived from the Recopilacion de Indias, & Leyes de Castilla & les uses & Coutumes de Paris for what respects usages & Customs."⁶⁷ He may simply have been mistaken, or perhaps he was referring to the continuance outside New Orleans of French "folkways" of the type noted by the late Professor Hans Baade.⁶⁸ Edward Livingston wrote to his brother:

The Spaniards when they took possession of the Province abrogated the French and introduced the Spanish laws. Laussat during his ephemeral reign restored a very important part of the French municipal law, and when he gave over the country to us we promised to preserve its laws until they should be altered by the constituted authorities. The Governor having the powers conferred on him by the president of both Governor General and Intendant conceives himself

⁶⁵ Letter from Governor [William C. C.] Claiborne to the President [Thomas Jefferson] (Aug. 24, 1803), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 16-25 at 19.

⁶⁶ On the Irish Old Etonian, Clark, *see, e.g.*, JULIEN VERNET, STRANGERS ON THEIR NATIVE SOIL: OPPOSITION TO UNITED STATES' GOVERNANCE IN LOUISIANA'S ORLEANS TERRITORY, 1803-1809, 13-14 (2013). Clark features extensively in Vernet's book.

⁶⁷ Letter from Daniel Clark to the Secretary of State [James Madison] (Sept. 8, 1803), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 28-47 at 35.

⁶⁸ Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in Notarial Jurisprudence*, 53 TUL. L. REV. 1, 57-75, 79-80 (1978); Hans W. Baade, *The Bifurcated Romanist Tradition of Slavery in Louisiana*, 70 TUL. L. REV. 1481, 1482 (1996).

authorized to legislate and his ordinances in English mixed with those of his predecessors in Spanish and French, the laws of Castille, the Customs of Paris, the Leyes de Partidas, les Edits du Roi, the Statutes of the United States, and the omnipresent Common Law of England make a confusion worse than that of babel⁶⁹

Of course, Livingston was writing in a rhetorical style both to amuse his brother and to convey an understanding of the complexity of the situation; but his acceptance that there might plausibly still be some French law in force or with some type of authority is notable. At much the same time, the authors of the Louisiana Remonstrance, another work written in a highly-colored rhetorical style, in discussing the first Territorial period, painted a similar picture. Its authors complained to Congress of “the involuntary errors, of necessity committed by judges uncertain by what code they are to decide, wavering between the civil and the common law, between the forms of the French, Spanish, and American jurisprudence, and with the best intentions unable to expound laws of which they are ignorant, or to acquire them in a language they do not understand.”⁷⁰

It certainly did not take long for the new Governor to have a more precise grasp of the actual situation in law. In October 1804, the arrival of J. B. Prevost to serve as judge of the new court, prompted him to write to the Secretary of State that the introduction of common-law forms would mean the court would “be accused by the designing few, of making injurious innovations on the Spanish law,” as indeed he himself already had

⁶⁹ Letter from Edward Livingston to Robert Livingston (May 6, 1804), *quoted in* DARGO, JEFFERSON’S LOUISIANA, *supra* note 63, at 196-97.

⁷⁰ Remonstrance of the People of Louisiana, Against the Political System Adopted by Congress for them, *in* 1 AMERICAN STATE PAPERS [MISCELLANEOUS], DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, FROM THE FIRST SESSION OF THE FIRST TO THE SECOND SESSION OF THE TENTH CONGRESS, INCLUSIVE, 396, 396 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales and Seaton, 1834).

been.⁷¹ But knowing that the law was Spanish merely revealed other problems. In 1803, Jefferson had also asked his correspondents about the sources of the law. Claiborne, as already quoted, simply stated that he had not been able to obtain a copy of O'Reilly's code; Clark, however, rather dishearteningly replied that "The Marquis de Yrujo & John Vaughan of Philadelphia had copies of the Spanish laws,—the French uses & Coutumes may I presume be easily found among the booksellers of the United States, they are not to be had here."⁷² Yrujo was the Marques de Casa Irujo, Spanish minister to the United States from 1796-1808;⁷³ John Vaughan was the Philadelphia wine merchant, who, from 1803, was Librarian of the American Philosophical Society.⁷⁴ The correspondent who may be Dunbar simply stated: "it is believed that no correct code can possibly be procured; excepting only a few ordinances promulgated and printed by order of General O'Reilly, respecting principally the laws of inheritance and rights of dower."⁷⁵

It is thus clear that access to the laws was a major problem, once it had been recognized that the law applicable in the Territory of Orleans was the Spanish colonial law as found in the Laws of the Indies, with a default reference to the Laws of Castile. Also, once the US Government started to organize its newly acquired colony—first through the Governor, then the Governor with the appointed Legislative Council, and finally the Governor and Territorial Legislature—new sources of law and new legislation developed that had to be accommodated to the existing law of Spanish origin, which in itself had to be accommodated to the principles of the U.S. constitution.

⁷¹ Letter from Governor [William C. C.] Claiborne to the Secretary of State [James Madison] (Oct. 29, 1804), in *ORLEANS TERRITORIAL PAPERS*, *supra* note 17, at 317.

⁷² Letter from Daniel Clark to the Secretary of State [James Madison] (Sept. 8, 1803), in *ORLEANS TERRITORIAL PAPERS*, *supra* note 17, 28-47 at 35.

⁷³ Eric Beerman, *Spanish Envoy to the United States (1796-1809): Marques de Casa Irujo and His Philadelphia Wife Sally McKean*, 37 *THE AMERICAS*, 445 (1981).

⁷⁴ Roy Goodman & Pierre Swiggers, *John Vaughan (1756-1841) and the Linguistic Collection in the Library of the American Philosophical Society*, 138 *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY*, 251 (1996).

⁷⁵ *Condition of Louisiana in 1803, When the American Government took Possession*, *supra* note 64, at 693.

A decade later, in the course of the long-running dispute over the New Orleans Batture, Edward Livingston explained reasonably clearly what these laws were and the main sources:

A code had long been prepared for the government of the Spanish colonies in the *Indies*, by which name they designated all their American possessions. It is called the "*Recopilacion de las Leyes de las Indias*." It introduced the law of Castile, those of the *Partidas*, and of *Toro*; that is to say, the whole body of the laws of Spain, in all cases not provided for by the laws of the *Indies*, and declares that the laws of that collection shall prevail in all the Spanish colonies, as well those then established, as those which might in future be discovered or established.⁷⁶

Thus, to know what the law in Louisiana might be, it was necessary to examine a variety of collections. The matter was rather more complex than the quotation from Livingston might suggest. First to be considered was the *Recopilación de leyes de los reinos de las Indias* of 1680, which collected together Spanish colonial legislation, and any other general legislation for the *Indies* or legislation specifically for Louisiana. One law in this *Recopilación* stated that if there were no such laws, then recourse was to be had to the laws of the kingdom of Castile in conformity with those of *Toro*.⁷⁷ The *Leyes de Toro* dated from 1505 and, in their first provision set out a hierarchy for Castilian law: first the *Leyes de Toro* themselves; second, the *Ordenamiento de Alcalá* and other *ordenamientos* and *pragmaticas*; third, *fueros municipales y reales*, especially the *Fuero real*, and last the *Siete Partidas*. Although the *Siete Partidas* were last in precedence, they were in effect the most important source. Of great practical significance was the *Nueva*

⁷⁶ EDWARD LIVINGSTON, AN ANSWER TO MR. JEFFERSON'S JUSTIFICATION OF HIS CONDUCT IN THE CASE OF THE NEW ORLEANS BATTURE 31 (Philadelphia, Printed by William Fry, 1813).

⁷⁷ RECOPILACIÓN DE LEYES DE LOS REINOS DE LAS INDIAS, II.i.2 (4th imp., Madrid, viuda de D. Joaquin Ibarra, 1791).

Recopilación de las leyes de estos reynos, first issued in 1567, that gathered together much Castilian legislation to that date, including, for example, many of the laws of Toro. In 1745, a collection of *Autos Acordados*, that is of further Castilian laws, was published arranged in the order of the *Recopilación*. As well as these sources, there were important commentaries and glosses, notably those of Gregorio López on the *Siete Partidas*, Antonio Gómez on the *Leyes de Toro*, and Alfonso Díaz de Montalvo on the *Fuero real*, as well as more general juristic literature. Further, the *Siete Partidas* were Romanizing in effect, and Roman law had a significant impact on the interpretation and development of the law of Castile. It is finally worth noting that on any topic it might be necessary to consult a number or even all of the collections to develop a picture of the law.⁷⁸ One modern author, reflecting on the Spanish legal system at the end of the eighteenth century, described the range and multitude of texts, both of royal and canon law, along with the practice of using Roman law in support, together with the huge number of authors who had commented on the texts, as constituting a labyrinth for the lawyer trying to find relevant doctrine and current legislation.⁷⁹

Anxiety about the law in the early territorial period might indeed seem a sensible response to the circumstances. The makeshift judicial system put together by Claiborne pending Congress's establishment of a more regular government for its new colony must have been the initial cause of disquiet. As the population increased and more lawyers entered the Territory, the fact that most of the laws in force were written in Spanish was hardly desirable for a population that tended to be either anglophone or

⁷⁸ See, e.g., KATE WALLACH, BIOGRAPHICAL HISTORY OF LOUISIANA CIVIL LAW SOURCES: ROMAN, FRENCH AND SPANISH 61-79 (1955); CAIRNS, CODIFICATION, TRANSPLANTS, AND HISTORY, *supra* note 9, at 44-52. On the *Autos Acordados*, see now José Luis Bermejo Cabrero, *Nueva Recopilación y Autos Acordados (1618-1745)*, 70 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL, 37 (2000).

⁷⁹ José M. Mariluz Urquijo, *El "Teatro de la legislación universal de España e Indias" y otros recopilaciones indianas de carácter privado*, 8 REVISTA DEL INSTITUTO DE HISTORIA DEL DERECHO, 267, 267 (1957).

francophone; that copies of these laws were also not readily obtainable was a further problem. Jeremiah Brown commented that, “at the time of the transfer to the United States ... there was scarcely a law book in the country except those of the intendant and the auditor.”⁸⁰ Brown is an overtly hostile source; but Allan B. Magruder still stated in 1807 that in “civil concerns, rules of right are sought from a thousand sources, often enveloped in the mysteries of unknown languages, and the unwritten customs and usages of the descendants of European nations....”⁸¹ As late as 1811, François Xavier Martin, then one of the judges of the Superior Court of the Territory, remarked that the “arduous task” imposed on the judges of the Territory of examining and comparing “a number of foreign laws” was made “extremely so here, from the scarcity of the works of foreign jurists.”⁸² It is easy to imagine that the situation had been even more extreme in the earlier territorial period. Such information as there is about the book trade in Territorial Louisiana tends to confirm that law books would not be readily accessible, even if we find mention of some in newspaper advertisements.⁸³

IV. LEGISLATURES AND CODES

Congress had established a first level of territorial government by an act passed on March 26, 1804 that came into force on October 1. This formally divided the Territory of Orleans from the rest of the former huge province of Louisiana.⁸⁴ It continued “the laws

⁸⁰ BROWN, SHORT LETTER, *supra* note 19, at 14.

⁸¹ *Quoted in* DARGO, JEFFERSON'S LOUISIANA, *supra* note 63, at 199.

⁸² François-Xavier Martin, *Preface*, in 1 FRANÇOIS-XAVIER MARTIN, ORLEANS TERM REPORTS, OR CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF THE TERRITORY OF ORLEANS [iii], v (New-Orleans, John Dacqueny, 1811). On Martin, see Michael Chiorazzi, *François-Xavier Martin: Printer, Lawyer, Jurist*, 80 LAW LIBR. J. 63 (1988).

⁸³ John M. Goudeau, *Booksellers and Printers in New Orleans, 1764-1885*, 5 J. LIBR. HIST. 5, 7-11 (1970); Roger Philip McCutcheon, *Books and Booksellers in New Orleans, 1730-1830*, 20 LA. HIST. Q. 606, 610-11 (1937).

⁸⁴ An Act Erecting Louisiana into Two Territories, and Providing for Temporary Government Thereof, 1804, c. 38, § 1, *reprinted in* 2 U.S. CONGRESS, PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, 283-89, 283 (Richard Peters ed., Boston, Charles C. Little & James Brown, 1845).

in force” as in effect.⁸⁵ It created a Legislative Council, the members of which were to be appointed by the President;⁸⁶ it also erected a superior court, empowering the legislature to create inferior courts.⁸⁷ The Legislative Council first met on December 4, 1804.⁸⁸ The recently arrived Judge Prevost convened the Superior Court for the first time on November 5, 1804.⁸⁹ By December 19, he was pointing out to Madison the difficulties with the legal system, and the problems with reconciling “the antient laws of the country with the provisions of the act organizing this government and with the principles of our Constitution.” He had concluded that a code was what was necessary to resolve the difficulties. He accordingly informed Madison that he had “interested [himself] much with the Council to induce them to employ some of the bar in forming a code of laws, they have at length consented to unite Mr Brown and Mr Livingston for the purpose, the governor however opposes this arrangement either from an enmity to the[se g]entlemen or from a persuasion that the laws of Tennessee se[ver]al of which he has actually presented, are fit for every state of Society in whatever clime....” Prevost sought Madison’s assistance in this project, which he saw as a means of promoting a reception of the common law.⁹⁰ A month later James Brown himself discussed this project in his correspondence:

Should the present system [of Territorial Government] be continued until October I have conceived that much good might be done by availing ourselves of the assistance of the Council to adopt a good code of Laws for the Government of the Territory. We possess all the materials for the able execution of such a

⁸⁵ *Id.* § 11, at 286.

⁸⁶ *Id.* § 4, at 284.

⁸⁷ *Id.* § 5, at 284

⁸⁸ Governor [William C. C.] Claiborne to the President [Thomas Jefferson], Dec. 8, 1804, *in* ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 348.

⁸⁹ DARGO, JEFFERSON’S LOUISIANA, *supra* note 63, at 200.

⁹⁰ Letter from Judge [John B.] Prevost to the Secretary of State [James Madison] (Dec. 19, 1804), *in* ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 356-57.

work[.] The Civil law—the Spanish ordinances—the British Statute and Common Laws, and the codes of all the States are spread before us, and the people are prepared for the reception of a code ably compiled from these several systems—The Council is composed of characters ready to adopt a code which would meet the approbation of our Judges and American Lawyers. ... If such a code is not in operation on the commencement of the second grade of Government, it is but too probable we shall remain sometime without Laws or with a system too motley and complicated to be understood by our ablest jurists. ... Impressed with these ideas the council appear disposed to engage Mr Livingston and myself to digest a Code; but such is the unfortunate dislike of the governor towards the only man in whom the Council seems disposed to confide as my assistant, that it is beleived [*sic*] the measure will fall.⁹¹

Like Prevost, Brown was anxious that, if there were not a code by the time representative government was introduced, the new legislature would “generally be attached to the French Laws and will pass only acts resembling the Civil Law and the Spanish ordinances formerly in force here[.]”⁹² (The phrase “formerly in force” is intriguing.) The Legislative Council had in fact quickly established a committee to draft a civil and a criminal code;⁹³ on February 5, it resolved jointly with the Governor: “That the committee appointed by the said legislative council, to draught and report a civil and criminal code for the said territory, are hereby authorised to employ two counsellors at law, to assist them in the draughting of the said codes.” \$5,000 was to be

⁹¹ Letter from James Brown to John Breckinridge (Jan. 22, 1805), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 378, 379.

⁹² *Id.*

⁹³ LOUISIANA GAZETTE, Dec. 21, 1804, *cited in* DARGO, JEFFERSON’S LOUISIANA, *supra* note 63, at 226.

appropriated to compensate these lawyers.⁹⁴ If this stalled as an attempt to have a civil code drafted, in a few months the Legislative Council had nonetheless enacted a statute on criminal law and procedure. This specified individual crimes, and provided that they should “be taken, intended and construed, according to, and in conformity with, the common law of England,” and authorized the Governor to provide an exposition providing the details of individual crimes.⁹⁵ On August 12, 1805, Claiborne appointed Lewis Kerr to undertake this task.⁹⁶ This mode of proceeding apparently had a precedent in Kentucky.⁹⁷ Kerr was able to transmit a manuscript to the Governor on January 1, 1806.⁹⁸

On March 2, 1805, Congress enacted a new statute re-organizing the government of the Territory of Orleans, to come into force on July 4. The new structure of government was stated to be “in all respects similar” to that in the Mississippi Territory. There were to be two houses in the Legislature, a Legislative Council of five appointed by the President from ten nominations made by the elected General Assembly or House of Representatives, which was to be convened in November 1805.⁹⁹ These institutions for territorial government were first laid down in the Northwest Ordinance of 1787, which had provided a template for a number of other territories as well as that of

⁹⁴ Joint Resolution of Both Branches of the Legislature, Feb. 4, 1805, in *ACTS PASSED AT THE FIRST SESSION OF THE LEGISLATIVE COUNCIL*, *supra* note 28, 458-61.

⁹⁵ An Act for the Punishment of Crimes and Misdemeanors, 1805, c. 50, ss. 33 and 48, *supra* note 57, at 416-53.

⁹⁶ See Letter from W. C. C. Claiborne to Lewis Kerr (Aug. 12, 1805), in *AN EXPOSITION OF THE CRIMINAL LAWS OF THE TERRITORY OF ORLEANS: THE PRACTICE OF THE COURTS OF CRIMINAL JURISDICTION, THE DUTIES OF THEIR OFFICERS, WITH A COLLECTION OF FORMS FOR THE USE OF MAGISTRATES AND OTHERS*, [iv-vii] (Wm. W. Gaunt 1986) (1806) [hereinafter *EXPOSITION OF THE CRIMINAL LAWS*]. See Billings, *Neglected Treatise*, *supra* note 58.

⁹⁷ KILBOURNE, *supra* note 29, at 29 and 29 note 90.

⁹⁸ Letter from Lewis Kerr to W. C. C. Claiborne (Jan. 1, 1806), in *EXPOSITION OF THE CRIMINAL LAWS*, *supra* note 96, at [viii]-xiii.

⁹⁹ An Act further Providing for the Government of the Territory of Orleans, 1805, c. 23, §§ 1-22, *reprinted in* 2 U.S. CONGRESS, PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, 322-23 (Richard Peters ed., Boston: Charles C. Little & James Brown, 1845) [hereinafter cited as *Act further Providing for the Government of the Territory of Orleans*].

Mississippi.¹⁰⁰ The new organic act for the Territory of Orleans stated that the President was to appoint the necessary officers “in conformity with the ordinance” of 1787, while the inhabitants of Orleans were to “be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance.” A provision preserved “the laws in force”; another excluded from extension to the Territory of Orleans the Ordinance’s provisions on “the descent and distribution of estates” as well as an article in the ordinance prohibiting slavery.¹⁰¹

The Act erecting the Territory of Mississippi, on the government of which that of Orleans was to be based, had few specific provisions, instead relying by reference on the terms of the Northwest Ordinance.¹⁰² This stated: “There shall also be appointed a court to consist of three judges any two of whom to form a court, who shall have a common law jurisdiction”¹⁰³ This inevitably raised a question of interpretation. The Congressional Act of 1805 did not reconstitute the Territorial Court established in 1804; but, nonetheless, its references to the Government of the Territory of Mississippi and to the Northwest Ordinance raised two obvious questions: did this provision apply to the Territorial Court? If it did, how was the term “common law” to be understood? In the early 1800s, the primary understanding of the term “common law” in the Ordinance would have been in terms of a comparative-law analysis, so it would have generally been seen as meaning “common law” in an opposition to “civil law.” The fact that the

¹⁰⁰ An Ordinance for the Government of the Territory of the United States North West of the River Ohio, July 13, 1787, *reprinted in* 32 LIBRARY OF CONGRESS, JOURNAL OF THE CONTINENTAL CONGRESS 1774-1789, 334-43 (1936) [hereinafter cited as Northwest Ordinance]; Denis P. Duffy, *The Northwest Ordinance as a Constitutional Document*, 95 COL. L. REV. 929, 930 (1995).

¹⁰¹ Act further Providing for the Government of the Territory of Orleans, *supra* note 99, §§ 1, 4, 5.

¹⁰² An Act for an Amicable Settlement of Limits with the State of Georgia, and Authorizing the Establishment of a Government in the Mississippi Territory, 1798, c. 28 *in* 1 U.S. CONGRESS, PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, 549-50 (Richard Peters ed., Boston, Charles C. Little & James Brown, 1845).

¹⁰³ Northwest Ordinance, *supra* note 100, at 336.

1805 Act specifically stated that the provisions of the 1787 ordinance on descent and distribution of estates were not to be applied might be taken to imply that this provision was indeed applicable, whatever it meant.

Towards the end of June, 1805, the Legislative Council created under the Congressional Act of 1804 convened for the second and last time for a very short legislative session.¹⁰⁴ Claiborne sent a message to the Council, urging subjects for its consideration, in which he alluded to the recent Act of Congress and the Northwest Ordinance, noting that the latter “declared that the Court to be established in virtue of it, Shall have a ‘common law Jurisdiction,’ and that the Citizens shall be entitled to the benefit of Judicial proceedings according to the course of the common Law.” He recommended that the Council “consider how far this constitutional provision will necessarily innovate upon your present System, and what measures may be expedient to prevent the inconveniences that might attend an unprepared transition from one mode of practice to another.”¹⁰⁵ It is not entirely clear what Claiborne had in mind. Perhaps he was considering the work of the Council’s committee on codification, established in December 1804.¹⁰⁶ But this obviously raised in the minds of some the possibility that Claiborne was encouraging a reception of the common law.

As it turned out, in this very short, second, legislative session, prorogued *sine die* on July 3 after first meeting on June 22, the Legislative Council did enact a number of statutes

¹⁰⁴ ACTS PASSED AT THE SECOND SESSION OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF ORLEANS (New-Orleans, James M. Bradford, 1805).

¹⁰⁵ Message from Governor Claiborne (June 22, 1805), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 103-04.

¹⁰⁶ DARGO, JEFFERSON’S LOUISIANA, *supra* note 63, at 226.

concerning the legal system;¹⁰⁷ but there was nothing that could be identified as fulfilling Claiborne's suggestion. Indeed, on the day of the prorogation, Julien Poydras, hitherto one of Claiborne's most significant supporters among the francophone community, in a speech in response to that of the Governor, addressed directly the issue of the laws. After indicating that laws should be "simple, natural, clear, intelligible to those whose conduct is to be regulated thereby," they had also to be "adapted to the local circumstances, the necessities, the manners of the people which they are to rule." They ought not to have complicated forms, and have a style that is "pure, correct, and purged of those barbarous foreign expressions" that make the laws unintelligible and create the necessity of having interpreters. He also stated that one should avoid "servile attachment to ancient usages, whether good or bad; to ancient laws though most absurd, and formed in the midst of tyranny and barbarity." This may initially have suggested to Claiborne that he had convinced at least Poydras; but, if so, he was about to be disabused. Poydras next commented "on of the consequences of this fatal prejudice:"

We are on the eve of seeing confusion established on the banks of the Mississippi, by the forced introduction of a voluminous body of common law to which we are total strangers; laws which are quite foreign to our constitution, our liberty, our circumstances and our manners, and are wholly unknown and inapplicable to us. And why is this to take place? Because our ancestors of glorious memory were children of the Thames, had they been natives of Japan or China, the Bambou would be justice of the peace amongst us, as it has been for numberless ages amongst the inhabitants of those empires.¹⁰⁸

¹⁰⁷ Letter from William C. C. Claiborne to James Madison (June 26 1805), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 105; Speech—Delivered by Governor Claiborne, to the Legislative Council, on Proroguing them (July 3, 1805), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 108-13.

¹⁰⁸ Address, Delivered by Julien Poydras, to the Legislative Council, on its being Prorogued (July 3, 1805), NAT'L INTELLIGENCER & WASHINGTON ADVERTISER (Sept. 9, 1805).

After this bombshell lobbed at the Governor, Poydras finished his speech with an uplifting peroration; but he had made his point. He had turned the typical critique of the civil law into one of the common law in a strong argument for codification.

The House of Representatives of the new legislature met on November 4, 1805.¹⁰⁹ The Governor reminded them that their first duty, after electing a Speaker, was to nominate by ballot ten men, each with a freehold of 500 acres, whose names were to be returned to the President, who would select five from these to serve in the new Legislative Council.¹¹⁰ On November 11, Hazure de l'Orme moved before the House that its committee, already instructed to draft a memorial to Congress, should "pray for a repeal of that part of the act granting to the territory the second grade of government, as provides for the introduction of the common law, owing to the great confusion it will introduce in the courts of justice." The House accepted a proposal to postpone consideration of this until after "the opinion of the superior court should be known on the subject, understanding that the subject would be agitated tomorrow."¹¹¹

This is a reference to an inadequately recorded event, when a debate about the laws in force and the impact of the Northwest Ordinance was held before Judge Prevost on November 12. From Étienne Mazureau, a French-born lawyer, we know that he, Moreau Lislet, James Brown, Pierre Derbigny, and Edward Livingston argued against the claim that the Act of Congress had introduced the common law. He did not name counsel who took the opposing view, but remembered that they—"Scotch, English, Irish, and

¹⁰⁹ Letter from W. C. C. Claiborne to James Madison (Nov. 5, 1805), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 225-27.

¹¹⁰ Address to the House of Representatives (Nov. 4, 1805), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 223-24.

¹¹¹ Proceedings of the Territorial House of Representatives, in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 520-21.

others”—relied on “the organic law of the Court” as carrying with it “the jurisdiction of common law.” Mazureau attributed the success of those arguing for the civil law to the outstanding argument of Edward Livingston. He also noted that the organic acts had also preserved the laws in force.¹¹² There are only very general accounts of Prevost’s opinion. He apparently recognized Roman, Spanish, and French civil law as the law of the territory, on the basis that “common law” in the Ordinance meant the common law of the territory, that is, in the case of that of Orleans, the civil law in force.¹¹³ Jeremiah Brown stated that the basis of Prevost’s decision was the view that “Congress ... could never have intended ... to subvert the laws of a country.”¹¹⁴ Given the understandable concerns about the actions of the Spanish, all of this will have troubled the ever-anxious Claiborne even more, and led to further doubts about the loyalty of the creoles.¹¹⁵

The new legislature, dominated by the francophone elite of the Territory, had its first meeting on March 24, 1806.¹¹⁶ In a lengthy address to it, the Governor drew attention to the “revision of the Judiciary System” as “of primary importance.” The final section on military matters indicates how anxious Claiborne remained about the possibility of a Spanish invasion.¹¹⁷ The reply of the Legislative Council was in very general terms; but that of the House of Representatives alluded to the issue of the “Revision of the judiciary

¹¹² Henry Plauché Dart, *Mazureau’s Oration on Mathews*, 4 LA. HIST. Q. 149, 173-74 (1921). BROWN, SHORT LETTER, *supra* note 7, at 17 states that of all the lawyers who argued there only Livingston and Derbigny “favored the civil law.” It may be that the others mentioned by Mazureau presented no direct oral argument. On Mazureau, see Tara Lombardi, *The Great Advocate: Étienne Mazureau, Accomplished Attorney and Statesman (1777-1849)*, 7 DE NOVO (Law Library of La., New Orleans, La.), Fall 2009, at 6.

¹¹³ DARGO, JEFFERSON’S LOUISIANA, *supra* note 63, at 230; FABER, LAND OF DREAMS, *supra* note 8, at 237.

¹¹⁴ BROWN, SHORT LETTER, *supra* note 19, at 17.

¹¹⁵ On the activities of the Spanish, see, e.g., FABER, LAND OF DREAMS, *supra* note 8, at 219-25.

¹¹⁶ Letter from Governor [William C. C.] Claiborne to the Secretary of State [James Madison] (Mar. 27, 1806), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 616; Letter from James Brown to John Breckinridge (Sept. 17, 1805), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 506-13 (discussing the likely composition).

¹¹⁷ Address to the Legislature of the Territory of Orleans (Mar. 24, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 274-81.

system.”¹¹⁸ By April 10, Claiborne was anxious about the activities of the Legislature. He predicted: “Many laws will be offered for my approbation & my duty will compel me to reject several.” He also saw tensions between the “ancient Louisianians” and the “few Native Americans” in the House of Representatives.¹¹⁹ On May 6, the governor vetoed a bill that set out conditions necessary to be fulfilled in order to be a member of the Legislature.¹²⁰ He complained to Madison, justifying himself, noting that the tensions between the “Ancient and modern Louisianians” meant that the Legislature had achieved little. The most “fruitful sources” of the discontent were “the introduction of the English language in our Courts of Justice; the Judicial System generally and particularly the Trial by Jury, and the admission of attorneys.” He hoped, however, that once the difficulties with Spain were settled matters would settle down.¹²¹

Claiborne was correct to identify the members of the Legislature as dissatisfied with the legal system. They remained anxious about the administration’s intentions as regards the law. Around or just after May 20, a bill was introduced into the Legislature that was intended to clarify Prevost’s decision of November 12 preceding; if the judge’s words were as indeterminate as they seem to have been according to the accounts preserved, this may even have been necessary or wise. But the bill was intended to give legislative force to his ruling. Though the text of this bill is reasonably well known, it is necessary to repeat it here *in extenso*:

¹¹⁸ Answer of the Legislative Council (Mar. 29, 1806); Answer of the House of Representatives (Apr. 2, 1806), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 618-22.

¹¹⁹ Letter from William C. C. Claiborne to Thomas Jefferson (Apr. 10, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 288-89.

¹²⁰ Letter from William C. C. Claiborne to the Legislative Council and House of Representatives of the Territory (May 6, 1806); Letter from William C. C. Claiborne to James Madison (May 8, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 296-98.

¹²¹ Letter from William C. C. Claiborne to James Madison (May 16, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 299-300.

An Act declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be resorted to as authorities within the same

Whereas by the effect of the reiterated changes which the government of this Territory has undergone, the diverse matters which now compose its judiciary system, are in some measure wrapped in obscurity, so that it has become necessary to present to the citizens the whole of these different parts, collected together by which they may be guided, whenever they will have to recur to the laws, until the Legislature may form a civil code for the Territory; and whereas by the 11th section of the act of Congress intitled "an act dividing Louisiana into two Territories and providing for the temporary government thereof" passed the 22^d march 1804, and by the 4th section of the act of the said Congress, intitled "an act further providing for the government of the Territory of Orleans" it is said, that the laws which shall be in force in the said Territory, at the Commencement of the said acts, and which shall not be contrary to the dispositions thereof, shall continue to be in force until altered, modified or repealed by the Legislature of the Territory.

Sect. 1st. Be it therefore declared by the legislative Council and the House of Representatives of the Territory of Orleans in general assembly convened, that by virtue of the said dispositions, the laws which remain in force, and those which can be resorted to as authorities in the tribunals of this Territory, save the changes and modifications which may have already been made by the Legislatures of the said Territory, save also whatever might be contrary to the constitution of the United States, to the laws of the federal government which have been extended to the said Territory by Congress, and to the acts of the said Congress which direct the present government of the said Territory, and save

therefore the modifications, which necessarily result from the introduction which the act of the 22d march 1804, has made into the said Territory of the two most important principles of the judiciary system of the common law, to wit, the writ of habeas corpus, and the trial by jury, are the laws and authorities following, to wit: 1.º The roman Civil code, as being the foundation of the spanish Law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the Emperor Justinian, aided by the authority of the commentators of the civil law, and particularly of Domat in his treaty of the Civile Laws; the whole so far as it has not been derogated from by the Spanish law; 2.º the Spanish law, consisting of the books of the *recopilation de Castilla* and *autos acordados* being nine books in the whole; the seven parts or *partidas* of the king Don Alphonse the learned, and the eight books of the royal statute (*fueroreal*) of Castilla; the *recopilation de indias*, save what is therein relative to the enfranchisement of Slaves; the laws de *Toro*, and finally the ordinances and royal orders and decrees, which have been formally applied to the Colony of Louisiana, but not otherwise; the whole aided by the authority of the reputable commentators admitted in the courts of Justice. Sect. 2. And be it further declared, that in matters of commerce the ordinance of Bilbao is that which has full authority in this Territory, to decide all contestations relative thereto; and that wherever it is not sufficiently explicit, recourse may be had to the roman laws; to Beawes *lex mercatoria*, to Park on insurance, to the treatise of insurances by Emorigon, and finally to the commentaries of Valin, and to the respectable authors consulted in the United States.¹²²

¹²² For the text, see Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319, 323-26 (1942); LEVASSEUR, MOREAU LISLET, *supra* note 18, at 55-57; Elizabeth G. Brown, "Legal Systems in Conflict: Orleans Territory 1804-1812", 1 AM. J. LEGAL HIST. 35, 46-

By May 22, Claiborne had decided to veto this bill.¹²³ His intention must have already been clear, as, from May 21 onwards, members of the Legislative Council started to intimate to him their resignations.¹²⁴ He vetoed the Act on May 26.¹²⁵

V. THE VETOED ACT AND THE SPANISH LAW

The proposed statute was rather strange, as contemporaries realized. Indeed, it is sufficiently unusual that it is tempting to suspect that it may have been passed with the aim that Claiborne should veto it, so that those in favor of the civil code mentioned in it should gain some political advantage by putting the governor on the defensive, through requiring him to justify his actions in vetoing the act.

The first thing to note is that the act refers to an unusual mix of primary and secondary sources, though this perhaps could be justified given the state of legal science in the Territory. After all, the previous year the statutory reform of criminal law and procedure had led to the authorized publication by Lewis Kerr of an *Exposition of the Criminal Laws of the Territory of Orleans*, as it was necessary to explain the new criminal laws of English origin.¹²⁶ The existing legal culture was not one into which the new

48 (1957). I have copied exactly the version given by Franklin, including obvious errors, though correcting “Civils Laws” to “Civile Laws” for Domat’s work. These errors are intriguing: was this a document in English produced by a francophone? Without access to the original it is impossible to say, as there may be printing errors in Franklin’s text.

¹²³ Letter from W. C. C. Claiborne to James Madison (May 22, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 305-6.

¹²⁴ Letter from Pierre Sauv   to Governor [William C. C.] Claiborne, May 21, 1806, in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 641; Letter from W. C. C. Claiborne to Pierre Sauv   (May 26, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 308-9; Letter from Jean No  l Destr  han to Governor [William C. C.] Claiborne, May 24, 1806, in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 641; Letter from W. C. C. Claiborne to John Noel Destrehan, May 26, 1806, in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 308.

¹²⁵ Letter from W. C. C. Claiborne to James Madison (May 26, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 309-11; Message to the Legislative Council, and to the House of Representatives (May 26, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 313.

¹²⁶ See Billings, *Neglected Treatise*, *supra* note 58.

criminal laws could readily be fitted. The *Exposition* was intended to assist understanding and application.

Another point to note is that the vetoed act contains one very obvious error, should the copy initially printed by Franklin in 1942 be accurate: the *Fuero Real* had only *four* rather than the *eight* books the statute apparently ascribes to it. This will be discussed further below, and an explanation suggested.

The statute also raised a number of practical problems, as one correspondent in a newspaper pointed out, in a series of rhetorical questions addressed to three members of the Legislature:

[I]n which century was the code of the emperor Justinian written? of how many volumes was it composed? and whether the seven parts or partidas of the king don Alphonso the learned can be purchased in this City?

If the Recopilacion de Castille, and Autos acordados, the laws of Toro, and the ordinance of Bilbao are in ether of your libraries?¹²⁷

These were fair and entirely justified questions. Of course, the writer raised them as an attack on the civil law; but his motivation does not diminish their cogency.

Jeremiah Brown also emphasized the problems posed by the vetoed act, suggesting in his sarcastic invective that the works listed were “apparently copied with indecent accuracy from the shelves of one of those french lawyers,” whom he has just criticized. He mockingly suggested that some important works had perhaps been omitted simply

¹²⁷ Letter from A Merchant, in *LA. GAZETTE* (June 10, 1806), *quoted in* LEVASSEUR, MOREAU LISLET, *supra* note 18, at 57.

because the lawyer's shelves had been organized by the "rank and quality" of the binding not of the authors:

So uncouth was the confusion in which books ancient and modern were ushered in, books of high authority and books of none, and so awkwardly were roman, french, spanish, english and american laws thrown as it were at random into the small space of this one short act, that before any legislature it might well have passed for a burlesque on the object of its compilers. It was carried through both houses by a large majority, but from the executive happily met with the fate it merited.¹²⁸

Despite the witty hyperbole, Brown was indeed correct that it is an odd listing of primary and secondary works. But this turns out to be very revealing.

It is important to single out one citation in particular, that of *Les lois civiles dans leur ordre naturel* written by the notable French jurist, Jean Domat, and first published in 1689. This was one of the most important law books of the eighteenth century; but it is not immediately obvious why Domat was here selected out of all the possible commentators on the civil law that could have been named. In modern scholarship Domat is regarded as important for his rationalist account of natural law and as part of the story of the movement towards codification in France, and as having exercised an important influence on the *Code civil des Français* of 1804 and on the Civil Code of Lower Canada of 1866.¹²⁹ He is not generally discussed as a commentator on the Roman law, but seen as systematizing law in France; of course, by the very nature of his work, a

¹²⁸ BROWN, SHORT LETTER, *supra* note 19, at 19-20.

¹²⁹ Alejandro Guzmán Brito, *La doctrina de Jean Domat sobre la interpretación de las leyes*, 31 REVISTA CHILENA DE DERECHO 39 (2004); Simone Goyard-Fabre, *Montesquieu entre Domat et Portalis*, 35 MCGILL. L. J. 715 (1990); David Gilles, *Les Lois civiles de Jean Domat, prémices à la Codification? Du Code Napoléon au Code civil du Bas Canada*, 43 R.J.T.U.M. 1 (2009).

natural-law exposition of the substance of Roman law, he is expounding and explaining Roman law in an accessible way. The very popularity of the book indicates his success in achieving this, setting out principles in an abstract way that often resembles the articles of a code, with quotations of relevant sections of the Roman texts. But it is not a conventional commentary on the Roman law; rather, it is more a type of rationalist and idealist account of law treated as a universal on a foundation of Roman law, with didactic and explanatory introductions to its various titles, developed in an essentially French context. In reality it is a distinctively French work. It is easy to understand its influence on later francophone codifications.¹³⁰

The question then remains: why was Domat's treatise privileged in the draft act of 1806 as a commentary on Roman law? The answer lies in the researches in the Spanish sources carried out by Louisiana lawyers. As indicated above, the Spanish sources were complex to use; but between 1791 and 1798 an important work, the *Teatro de la legislación universal de España e Indias, por orden cronológico de sus cuerpos, y decisiones no recopiladas y alfabético de sus títulos y principales materias*, was issued in Madrid in twenty-eight volumes. It was authored by Antonio Xavier Pérez y López. The work was, as the title indicates, organized alphabetically by legal topic. Entries on each topic would vary according to need. A full entry on a topic would start with a list of texts of Roman and Canon law, followed by a listing of the relevant Spanish legislation. There then could follow a brief introduction, before the quotation in full of any texts of canon law, and then in full of the relevant Spanish or Castilian law, including the laws of the Indies where relevant. Pérez had carried out the hard work of finding the relevant material in

¹³⁰ David Gilles, *La doctrine comme source des codifications: Jean Domat*, *STUDIA UNIVERSITATIS BABES-BOLYAI JURISPRUDENTIA* 61 (4/2009).

the Spanish sources for each topic, and had then quoted it; thus, if his texts were reliable, he had replaced the need to own an extensive library of individual collections of laws, while his selections and introductions had a didactic effect, allowing someone with a basic knowledge of the structures and vocabulary of the civilian legal tradition to negotiate the Spanish law by topic without having been educated in it. In other words, it was very useful in conditions such as those in the Territory. There is relatively little literature on this work; but it was of great importance in the Spanish Indies.¹³¹

The first volume of the *Teatro* has a lengthy introduction—the *Discurso Preliminar*—to the history, sources and collections of Spanish law, including those of the Indies. In the historical account towards the beginning, Pérez mentioned the spread of study of the Civil Law through Europe. He then noted he would not touch on the issue of the order or disorder of the *Corpus iuris*, or on that of the justice or utility of its provisions, on which law professors debated. Instead, he wrote: “I see the famous Domat has only arranged them, organizing them according to method in his work known by the name of the Civil Law organized according to its natural order.” He also noted that the celebrated Christian Wolff, and other authors on the law of nature and nations, who treated jurisprudence in a philosophical and geometrical method, differed very little from the Civil Law as regards contracts, last wills and other specific parts of the law, while the same could also be said of the famous Code of Frederick the Great.¹³² As a scholar Pérez

¹³¹ Mariluz Urquijo, *supra* note 79; Federico de Castro, *Nueva Biografía del Doctor Don Antonio Xavier Pérez y Lopez, con un breve estudio sobre su sistema filosófico*, 1 REVISTA DE LA UNIVERSIDAD DE MADRID, 83 (I), 351 (II), 687 (III) (1873). Pérez and his *Teatro* are also mentioned incidentally in studies of Spanish dictionaries of law.

¹³² 1 ANTONIO XAVIER PÉREZ Y LÓPEZ, *TEATRO DE LA LEGISLACIÓN UNIVERSAL DE ESPAÑA E INDIAS, POR ORDEN CRONOLÓGICO DE SUS CUERPOS, Y DECISIONES NO RECOPILADAS Y ALFABÉTICO DE SUS TÍTULOS Y PRINCIPALES MATERIAS* VIII (Madrid, Imprenta de Manuel Gonzalez, 1791) [hereafter cited as PÉREZ, *TEATRO*]

was very interested in natural law (he was a doctor of canon law);¹³³ this is the context of his comments about Domat.

It seems very likely that the drafters of the vetoed act of 1806 had read Pérez's *Discurso Preliminar*. The twenty-eight volumes of his *Teatro* would be by far the most useful legal work for any lawyer practicing in the Territory of Orleans before the enactment of the Digest. It is clear that later the *Teatro* was very familiar to Moreau Lislet, since he used it both in compiling the de la Vergne volume and in his later translation of the Partidas, again alluding to Domat as a commentator on Roman law.¹³⁴ Indeed, one wonders if it was to the *Teatro* that Brown referred in 1805 when he talked of "the Spanish ordinances" as among the works "spread before us."¹³⁵ It is a plausible description.

Supporting this suggestion is the observation that the draft act also refers to the "the *recopilacion de Castilla* and *autos acordados* being nine books in the whole;" this rather resembles Pérez's remark that the Recopilación and the Autos Acordados are "two bodies that are divided into nine books," a comment which, as in the act, is then followed by an allusion—if here brief and incidental—to the Siete Partidas.¹³⁶ Likewise, the error attributing eight books to the Fuero Real may be the product of careless reading, note-taking and understanding of Pérez's *Discurso Prelimnar*. Pérez refers to publication of collections of disparate types of royal legislation before and after the Cortes of Castille held at Toro. He writes that the first of these was known as *Ordenamiento Real*, authorized and published in 1496 by the Reyes Católicos, Ferdinand

¹³³ Castro, *supra* note 119, at 352 (II).

¹³⁴ Cairns, *De la Vergne Volume*, *supra* note 9, at 52-60.

¹³⁵ Letter from James Brown to John Breckinridge (Jan. 22, 1805), in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 378-80.

¹³⁶ PÉREZ, *TEATRO*, *supra* note 132, at XXVII.

and Isabella, adding that it was divided into eight books, and these into diverse titles. Pérez comments that because the major part of the laws of this *Ordenamiento* were inserted in the *Recopilación*, and because its titles corresponded with those of the latter, it was unnecessary to say more about it.¹³⁷ Given that this passage is found in Pérez' *Discurso Preliminar*, just prior to the remark about the nine books of the *Recopilación* and *Autos Acordados*, it is tempting to conclude that the drafter of the act had this passage in front of him and has mistakenly confused the *Ordenamiento Real* with the *Fuero Real*.

If this argument is correct, a number of conclusions may be drawn and conclusions reinforced that were based on other evidence. First of all, the very nature of the Spanish legal material was causing problems. If the Spanish sources constituted a “labyrinth” for the Spanish lawyer, they must have been very difficult to negotiate in the territory of Orleans with its lack of books. If the *Teatro* offered a solution, ignorance could still cause problems, as the 1806 draft act showed. Secondly, the *Teatro* presented texts of law in an accessible way, but they still needed to be understood. The Act suggests a rather crude level of comprehension. Training in a civil law system, and a knowledge of its vocabulary, was probably necessary to utilize the *Teatro* efficiently and well. Thirdly, the act focuses on the significance of the Roman or civil law as the foundation of Spanish law. Fourthly, it should always be recalled that those lawyers in the Territory who were trained civilians had trained in the French tradition, not in the Spanish, and it would be interesting to know how widespread was knowledge of the Spanish language—one suspects not very. Finally, it is difficult to accept that the act was seriously intended,

¹³⁷ *Id.*, at XXVI.

other than to goad the governor into exercising a veto. His veto then cleared the way for the preparation of a bilingual civil code drawing on the best modern sources.

VI. THE MANIFESTO AND THE CODE

Since the Governor's veto was expected, the Legislative Council, with the support of ten members of the House of Representatives, was able on the same day to issue a "Manifesto" that embodied a resolution for the dissolution of the Legislature, as well as presenting a relatively detailed argument on the law. The main thrust of this clever document—entitled Address of the Legislative Council to the People—was to argue for a bilingual civil code and to identify the law of the Territory with the authority and prestige of the Civil or Roman law. It was also concerned to stress that opposition to Claiborne's policies on the law was not evidence of disloyalty to the American regime.¹³⁸ To demonstrate this it is worth examining parts of it in some detail.

The reason given for the dissolution was the Governor's vetoing of the laws passed, most notably, of course, the declaratory law quoted above. The Manifesto emphasized, however, that, as stated in the preamble to the draft Act, the aim was to clarify "our present judicial system and [do] away with its uncertainty until [the Legislature] should have time to draw up a civil code."¹³⁹ It also claimed that "[t]he most inestimable benefit for a people is the preservation of its laws, usages, and habits."¹⁴⁰ It stated that this had been the intention of the U.S. Congress in its Act of 1805 on the government of the

¹³⁸ *Le Telegraphe – Nouvelle Orleans – Mardi 3 Juin 1806 – Extrait de la Seance du Conseil Legislatif, Du 26 Mai, 1806*, in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 643-57. This contains both the French and English texts. I shall quote from the English text in this source. A very slightly different version of the English text is found on the front pages of the NAT'L INTELLIGENCER AND WASHINGTON ADVERTISER (Aug. 11 & 13, 1806), reflecting a different translation from the original French. I shall here quote from the ORLEANS TERRITORIAL PAPERS, *supra* note 17, though I have checked them against the version in the Washington newspaper.

¹³⁹ Manifesto, in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 656.

¹⁴⁰ *Id.* at 650.

Territory, noting that Congress had applied to the territory “all of the common law [*la Loi Commune*] which it considered indispensable to prescribe for us ... the right to be judged by one’s peers and the *writ of habeas corpus*.”¹⁴¹ The Manifesto commented:

[T]he Constitution of the United States and the other Federal laws being general for the whole Union, it would be absurd to claim that this Territory ought not to be subject to them: but as to laws regarding contracts, wills and successions, what difference does it make that here such acts should be governed by the civil law [*le droit civil*] while in the other States of the Union they are governed by the common law [*la loi commune*].¹⁴²

Hinting at the current problems the administration had due to anxiety about the intentions of Spain, and playing on Claiborne’s suspicions of the loyalty of the creoles, it added that “it would be exposing [a citizen’s] affection to the danger of being alienated and exciting disorder and general discontent to disturb those customs to which each province is attached by bonds of experience and long habit.”¹⁴³

The Manifesto pointed out, perfectly reasonably, that in “the United States itself there is no general civil code.” Each state has been allowed its own unique common law.¹⁴⁴ This was why the Congress granted to the Territory “the privilege of keeping its old laws or of changing or modifying them”¹⁴⁵ But the Manifesto was keen to claim the reputation of the Roman laws for the law of Louisiana: “Now, every one knows that those old laws [*anciennes lois*] are nothing but the civil or Roman law [*la loi civile ou romaine*] modified by the laws of the government under which this region existed

¹⁴¹ *Id.* at 651.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 651-52.

¹⁴⁵ *Id.* at 652.

before the latter's cession to the United States."¹⁴⁶ If the titles of the old laws might seem "barbarous or ridiculous," the fact that hitherto citizens had been happy under them showed "their mildness and their wisdom."

In any case it is no less true that the Roman law [*la loi romaine*] which formed the basis of the civil and political laws [*la base des lois civiles et politiques*] of all the civilized nations of Europe presents an ensemble of greatness and prudence which is above all criticism. What purity there is in these decisions based on natural equity; what clearness there is in the wording which is the work of the greatest jurists, encouraged by the wisest emperors; what simplicity there is in the form of those contracts and what sure and quick means there are for obtaining the remedies prescribed by the law, for the reparation of all kinds of civil wrongs.

We certainly do not attempt to draw any parallel between the civil law and the common law [*la loi civile et la loi commune*]; but, in short, the wisdom of the civil law [*la loi civile*] is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair.¹⁴⁷

The Manifesto emphasized that everyone knew the basics of the existing legal system—succession, parental authority, marriages and marriage contracts, buying and selling, and remedies—and had a "tincture of this general and familiar jurisprudence."

Overthrowing this all at once would cause great dislocation.¹⁴⁸ The Manifesto explained:

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 653.

The first legislature of this Territory has to be particularly interested in establishing the fundamental bases; the secondary laws, accessory laws and details should only come later, otherwise one is exposed to making parts which will be found inconsistent with the whole. Now, what is the first law, the most important law in the present situation of this country; what is the fundamental basis of the great edifice of its future legislation? It cannot be denied that it is the matter of giving to it a civil code.¹⁴⁹

This was particularly necessary when the judges in the courts and the lawyers pleading before them were “almost all strangers to the French language and still more so to the language in which the greater part of the laws of this country are written” and given “the very scarcity even of the elementary authors who deal with them.”¹⁵⁰ But before undertaking this, it was necessary to determine “what would be its basis and what would be the canvas on which one would do the work.” It was in the interest of the inhabitants to keep “of the old laws, everything which can be saved without disadvantage and without going contrary to the system of our Government, and of not having recourse to foreign codes except in so far as the old may be found defective or prejudicial.”¹⁵¹ Continuity was required:

For all the contracts which have been made till now must necessarily be judged by the laws under which they were made; so how great would be the embarrassment of the courts if, while canceling everything which remains of the civil law [*la loi civile*], the courts should nevertheless be left under the necessity

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 653-54.

¹⁵¹ *Id.* at 654.

of judging, under that same law, of the effects of all contracts and documents made down to today?¹⁵²

It was thus necessary that the Legislature make “a code which shall be as near to [our old laws] as possible.” These principles had led the Legislature “to place, before its act on the formation of the code, a preliminary and declaratory law regarding the laws which were to serve as a basis for that work.”¹⁵³ It was necessary, because both “[t]he debate in the Chamber of Representatives and even the refusal of the sanction of the Governor” might suggest “that there is a secret intention of throwing us, despite ourselves, into the frightful chaos of the common law.” Against those who had claimed that, “by keeping the civil law we are adopting everything that is most revolting and contrary to the Republican régime,” it was argued that nothing would be retained that was contrary to the Constitution of the United States.¹⁵⁴ All of this justified the resolution to dissolve the Legislature.¹⁵⁵

The Legislature did not act on the proposed Resolution to dissolve, which, according to Claiborne, was rejected by the House of Representatives on May 27, 1806.¹⁵⁶ But the text of the Manifesto was published in New Orleans in both *Le Télégraphe* and the Louisiana Gazette in early June.¹⁵⁷ It undoubtedly raised anxiety among those hoping for a reception of the common law.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 654-55

¹⁵⁵ *Id.* at 656-57.

¹⁵⁶ Letter from William C. C. Claiborne to James Madison (May 28, 1806), in 3 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 319.

¹⁵⁷ ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 643; JOSEPH T. HATFIELD, WILLIAM CLAIBORNE: JEFFERSONIAN CENTURION IN THE AMERICAN SOUTHWEST, 148-49, 350 nn.23-25 (1976). See also NAT’L INTELLIGENCER (Aug. 11 & 13, 1806).

On the other hand, the manifesto's argument for a bilingual civil code undoubtedly had the potential to draw the sting from the criticisms leveled at the civil law in force. Simple arguments about accessibility and comprehensibility would be of no force against a comprehensive bilingual civil code. The code would be in both the major languages in the Territory and accessible to all. It is therefore unsurprising that Governor Claiborne accepted the Resolutions of both Houses on June 7, 1806 appointing Moreau Lislet and James Brown to draft a civil code.¹⁵⁸ Given he had already agreed in 1805 to a similar Resolution, it would have been politically difficult for him to refuse to do this.¹⁵⁹

VII. CONCLUSION

Jared Bradley in his study of Governor Claiborne's relations with the Spanish remarks:

By the summer of 1806 tensions on both sides of the border in the Southwest had been pushed to the breaking point. Late in July, it appeared that the long talked of war with Spain had begun: the Spanish troops stationed on the Trinity marched to the Sabine; on the twenty-ninth of the month they crossed the Sabine and moved to within ten miles of Natchitoches.

The situation on the Louisiana-Texas border was potentially explosive.¹⁶⁰

War did not come; but through the period of the vetoed act and the Manifesto culminating in the Resolutions of June 7 on the drafting of a civil code, Claiborne had been anxious about the military activities of Spain. Thus in March he was concerned about their "intriguing with the Indians," and their distributing "a quantity of

¹⁵⁸ Resolutions of June 7, 1806, *supra* note 13, at 214-19.

¹⁵⁹ Joint Resolution of Both Branches of the Legislature, Feb. 4, 1805, *supra* note 94. Both branches in this case being the Governor and Legislative Council.

¹⁶⁰ Bradley, *supra* note 1, at 313.

powder.”¹⁶¹ In the next month he worried that the French citizens who had not taken an oath of loyalty to the U.S.A. could not be tried for treason “if they were to take arms against us in the event of a War between Spain and the United States.”¹⁶² He raised with the Secretary for War, Henry Dearborn, the issue of the French Artillery in New Orleans that the Spanish wanted transported to Mobile, as the Spanish Governor there was “under an impression that a war between the United States and Spain was likely to ensue.”¹⁶³ In a letter to Jefferson about international politics and the possibility of war, he alluded to the “ancient Louisianians” being “greatly jealous of the few Native Americans” in the House of Representatives, and he saw there as being malcontents sowing “the Seeds of distrust & discontent.” It was in this letter that he alerted Jefferson to that fact that he would probably need to veto legislation.¹⁶⁴ He also discussed the supposed royal authorization of a Spanish settlement on the Trinity River.¹⁶⁵ He continued to see the Territorial Legislature as dominated by men “whose politics and views are ... in opposition to the interests of the United States.”¹⁶⁶ He did think that time and the dominance of the English language would eventually reconcile them to the United States.¹⁶⁷ He shortly thereafter rejected the act setting out the sources of the law.¹⁶⁸ Anxiety about the relationship with Spain continued and Claiborne continued to organize against a Spanish invasion, although as the summer wore on, he expressed less

¹⁶¹ Letter from William C. C. Claiborne to James Madison (Mar. 25, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 281.

¹⁶² Letter from William C. C. Claiborne to James Madison (Apr. 2, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 283.

¹⁶³ Letter from William C. C. Claiborne to Henry Dearborn Madison (Apr. 8, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 286.

¹⁶⁴ Letter from William C. C. Claiborne to Thomas Jefferson (Apr. 10, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 288-89.

¹⁶⁵ Letter from William C. C. Claiborne to James Madison (Apr. 16, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 289-90.

¹⁶⁶ Letter from William C. C. Claiborne to James Madison (May 14, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 298.

¹⁶⁷ Letter from William C. C. Claiborne to James Madison (May 16, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 299-300.

¹⁶⁸ Letters from William C. C. Claiborne to James Madison, (May 22 & May 26 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 305-6, 309-10.

alarm, until the Spanish again crossed the Sabine to garrison an area near Natchitoches, as Bradley mentions.¹⁶⁹

Of course, though there was to be no war with Spain, only the year before it had been rumored that the Territory was to be returned to Spain, so that political and military affairs will have seemed rather more delicate and dangerous than they now do with the benefit of hindsight.¹⁷⁰ But this background helps explain both Claiborne's veto of the act and acceptance of the Resolution for the drafting of a Civil Code. At a time when the rumor that the Territory might be returned to Spain was strong and when there were suspicious Spanish troop movements, allowing the enactment of a statute specifically enforcing and embedding Spanish law in the Territory was not a political possibility, given Claiborne had to deal with the potential threat from Spain, and suspected the loyalty of the incoming Europeans. It is this that suggests he may have been manipulated into using his veto. He was then most likely to try to assuage the resentment of the creole elites by acting in a pragmatic fashion, by capitulating or perhaps compromising over the law, thus allowing the drafting and then promulgation of a civil code. And this in any case is what he did.

Much attention has been devoted to the clash of legal traditions or the conflict between the civil law and the common law in the Territorial period.¹⁷¹ There can be no doubt but that many incoming anglophone Americans, including Governor Claiborne, had hoped for a reception of Anglo-American common law that went beyond courts, crimes, and

¹⁶⁹ Letter from William C. C. Claiborne to Richard Claiborne (Aug. 17, 1806), in 3 CLAIBORNE LETTER BOOKS, *supra* note 3, at 378-81.

¹⁷⁰ Paul D. Gelpi, *Mr Jefferson's Creoles: The Battalion d'Orléans and the Americanization of Creole Louisiana, 1803-1815*, 48 La. Hist. 295, 310 (2007).

¹⁷¹ Brown, *supra* note 122; DARGO, JEFFERSON'S LOUISIANA, *supra* note 63, at 185-266.

procedure to include private law.¹⁷² But by 1806 it was also perfectly clear that this was not going to happen. The creole elite was both simply too powerful and was being reinforced through 1804 and onwards by the arrival of further francophone refugees and migrants from France and the Caribbean—as we have seen, a matter of considerable and continuing concern to the Governor.¹⁷³ But wider international politics also had an impact.

This then returns us to the Digest of 1808. How did Moreau, Brown, and the Committee for the Revision of the Civil Code interpret the legislature's instructions? Why did they not codify on the basis of the Law of Castile? With Pérez's *Teatro* they had easy access to the rules of the Castilian law. They could have used it to draw up a code founded in that law, though this might have been a rather difficult task. But in November 1806, a mere five months after the Resolution, Jeremiah Brown was able to write that "our St. Domingo Lycurgus is avowedly copying his new code from that of Bonaparte, to the infinite delight of the whole party by whom he is employed."¹⁷⁴ As noted above, this is broadly correct, though the Digest is rather more original than this might suggest.¹⁷⁵ The "party" to whom Brown refers must be the creoles, some of the Americans, and the immigrants from St. Domingue and elsewhere.

¹⁷² DARGO, JEFFERSON'S LOUISIANA, *supra* note 63, at 188-200, 210-18.

¹⁷³ Letters from W. C. C. Claiborne to James Madison (Feb. 6 & Feb. 26, 1804), in 1 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 363-65, 387-88; Letters from W. C. C. Claiborne to James Madison (Apr. 9 & May 8, 1804), in 2 CLAIBORNE, LETTER BOOKS, *supra* note 3, at 88-89, 134.

¹⁷⁴ BROWN, SHORT LETTER, *supra* note 20, at 21-22.

¹⁷⁵ CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY, *supra* note 9, at 137-234, 357-96, 427-33 (demonstrating clearly and conclusively that in crucial areas of family law, persons, and contract the Digest is not Spanish law in French dress); Ostroukh, *supra* note 9, at 166-85 (showing how the account of property law in the Louisiana Code of 1825 is essentially French); PALMER, LOUISIANA CIVILIAN EXPERIENCE, *supra* note 39, at 19-49 (presenting a strong and convincing argument about a French origin for a great many articles).

The evidence of Jeremiah Brown demonstrates that to contemporaries there could have been no surprise in observing that the Digest was modeled on the *Code civil des Français*. As Professor Palmer has shown, it was common knowledge that the Digest was based on the French *Code civil*.¹⁷⁶ It was not a code of the Castilian private law supposedly in force, though it undoubtedly has some provisions drawn from that law, probably relying on the *Teatro* for knowledge of the actual texts of Castilian law as well as on Febrero's work for notaries, also influential in the Spanish Indies, for a discussion and exposition of certain topics.¹⁷⁷

The Resolutions of June 7, 1806 (in the French text with the heading "Résolution relative à la formation d'un code civil") provided that the code was to be based on "the civil law by which this territory is now governed" or, in French, "les lois civiles qui régissent actuellement ce Territoire."¹⁷⁸ To understand what was meant by the terms "civil law" and "lois civiles," it is important to examine the contemporary language used in Louisiana about law. The vetoed act of 1806 and the consequent Manifesto provide important examples of context. The first had emphasized that the "roman Civil code" was "the foundation of the spanish Law."¹⁷⁹ The Manifesto had argued that the "old laws," the "anciennes lois," in the Territory were "nothing but the civil or Roman law", "la loi civile ou romaine," modified by the laws of the former government of the colony. The "Roman law," "la loi romaine," was the "basis of the civil and political laws," "la base

¹⁷⁶ PALMER, LOUISIANA CIVILIAN EXPERIENCE, *supra* note 38, 25, n.24, and 82.

¹⁷⁷ Josef Febrero, *Librería de escribanos, é instrucción jurídica theórico práctica de principantes. Prima parte divida en tres tomos. Trata de testamentos y contratos* (Madrid: Impr. de P. Marín, 1789); Josef Febrero, *Librería de escribanos, é instrucción jurídica theórico práctica de principantes. Secunda parte divida en tres tomos. Trata de los juicios de inventario, y partición de acreedores, bienes de difunto, ordinario, executive, y de concurso, y prelación* (Madrid, Impr. de P. Marín, 1790); see Alberto David Leiva, *Aportes para un studio de la Librería de escribanos de Joseph Febrero*, 22 REVISTA DEL INSTITUTO DE HISTORIA DEL DERECHO, 302 (1971).

¹⁷⁸ Resolutions of June 7, 1806, *supra* note 13, at 214-215.

¹⁷⁹ Franklin, *supra* note 124, at 324.

des lois civiles et politiques,” of the civilized nations of Europe, while “the wisdom of the civil law [la loi civile] is recognized by all Europe” and, moreover, it claimed that this law was “the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair.”¹⁸⁰

The Act and the Manifesto emphasized that the law in the Territory of Orleans was the civil law in the sense of laws based on the Roman law. The Spanish law was represented as just a modern variation. What was most significant was that the law should not be the common law. This is not to say that the instructions in the Resolutions were deliberately couched in a particular way or were designed to be interpreted in a particular way. But it is certainly the case that the phrasing—“the civil law by which this territory is now governed” or “les lois civiles qui régissent actuellement ce Territoire”—was open enough to justify the nature of the code that was drawn up. The Manifesto is minimizing the differences between French law and Castilian law by focusing on the concept of civil law. French law could be represented as just another variation of the civil law. It should also be recalled that this was a period in which there was a continuing intensification of French culture in the Territory.

This said, the codifiers were undoubtedly eclectic and imaginative in their “arrant thievery,” to adapt Walton’s phrase. In 1847, Henry Bullard rather cruelly described the Digest as “little more than a mutilated copy of the Code Napoleon.”¹⁸¹ This is rather unfair and also quite misleading; the *Code civil* and its *projet* provided a basic structure,

¹⁸⁰ Manifesto, in ORLEANS TERRITORIAL PAPERS, *supra* note 17, at 651-52.

¹⁸¹ HENRY BULLARD, A DISCOURSE ON THE LIFE AND CHARACTER OF THE HON. FRANÇOIS XAVIER MARTIN; LATER SENIOR JUDGE OF THE SUPREME COURT, OF THE STATE OF LOUISIANA, PRONOUNCED AT THE REQUEST OF THE BAR OF NEW-ORLEANS, 11 (New-Orleans, Printed by J. B. Steel, 1847).

but there were other influences on the way the Digest was put together, just as there were other sources for various individual articles. It is a truly original work.

It is important to remember the background of the two codifiers. Moreau Lislet and Brown were educated, socially prominent, politically engaged, and influential individuals, who were evidently given a great deal of discretion in drafting the Digest, simply reporting to a revision committee. They both had close connections with the Territorial legislature. Their social background meant that they never doubted that they knew what was needed in the new code by virtue of their knowledge of the Territory and their significant engagement with its institutions, politics, and economy. They did not consider themselves necessarily constrained by a narrow sense of legal positivism. Instead, they will have considered themselves to be legal “technocrats,” resolving problems in the law by drawing on their expertise to create a code that would serve the Territory. They will have thought that what was wanted was an effective modern code, and the best example of one was that of France. In 1823 the Committee for the Revision of the Civil Code stated that the code was “hastily compiled.” It also stated that there had not been time for a close study of the existing law; but indeed one wonders if Brown and Moreau really believed in 1806-7 that such a detailed examination was necessary. Their technocratic approach worked, and the Committee in 1823 also described the Digest as a success, because its rules were “concise, and in general easily understood,” and had “been read by the people,” thus enabling “them to avoid disputes, on the subjects embraced by its provisions, that without them, would have led to endless litigation.”¹⁸²

¹⁸² Livingston, Moreau Lislet, Derbigny, Preliminary Report, *supra* note 40, at XCIII.